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No. 1105

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES D. CARTER
and
CHRISTOPHER MOSCATIELLO,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

Questions Presented

In applying the Speedy Trial Act, the Court of Appeals excluded 195 days for processing routine pre-trial motions. The basis for this ruling was that the date selected exempted those days ". . . which must be excluded to avoid a violation of the Act . . ." The question presented is:

1. Is only such delay as is reasonably necessary for fair processing of pretrial motions excludable under 18 U.S.C. §3161(h)(1)(F); and should this case be consolidated for review of that question with *Henderson* v. *United States*, 84-1744, which has recently been granted certiorari, 54 U.S.L.W. 3242 (10/15/85)?

Petitioner Carter also raises the following question, and adopts the reasons for granting the Writ, as to this question, set forth by Michael F. Murray in his Petition for Writ of Certiorari: *

2. When officers discover evidence during an illegal search, later obtain a valid warrant, "search" the premises again and seize what they previously found, must such evidence be suppressed, as six other Circuits have held, or is the evidence admissible under the inevitable discovery exception to the exclusionary rule, as the First Circuit held in this case?

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* Michael F. Murray's Petition will be filed on or before December 30, 1985.

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In the
Supreme Court of the United States

OCTOBER TERM, 1985

No. -

JAMES D. CARTER AND
CHRISTOPHER MOSCATIELLO,
PETITIONERS,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners, James D. Carter and Christopher Moscatiello,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on August 26, 1985, as amended by order dated October 31, 1985.

Opinions Below

There are two pertinent Memoranda and Orders of the District Court: one "On Various Motions of the Defendants to Suppress and Dismiss" and the other "Re Speedy Trial." Neither is officially reported, but copies of each are included within the Appendix which is at the end of this Petition. A-31 through A-50.

[1] The parties before the First Circuit were the United States, Christopher Moscatiello, John M. Rooney, James D. Carter and Michael F. Murray.

The Opinion of the Court of Appeals is reported at 771 F.2d 589. A copy of the original slip opinion is contained within the attached Appendix. A-1 through A-30.

The original slip opinion was rewritten at pages 11-12 (discussion of Speedy Trial Act) by the order of the Court of Appeals "On Petition For Rehearing." A-83 to A-84.

Pages 11-12 of the slip opinion, as rewritten by the Court's order of October 31, 1985, are also included within the Appendix. A-87 to A-88. While not an official issuance of the Court of Appeals, it is easier to follow than trying to read the original slip opinion in conjunction with the October 31 order.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on August 26, 1985, and the orders, denying both the Petition For Rehearing and the Petitions For In Banc Consideration, on October 31, 1985. A-83 to A-86. This petition was filed within 60 days of October 31, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutory Provision Involved

This case involves the Speedy Trial Act, 18 U.S.C. §3161, specifically the provision relating to the exclusion of time for the preparation, consideration and decision of pre-trial motions, 18 U.S.C. §3161(h)(1)(F). A copy of (h)(1)(F) is set out in the Appendix at page 68.

Statement of the Case

The only question presented in this Petition involves the Speedy Trial Act, 18 U.S.C. §3161(h)(1)(F).

James D. Carter ["Carter"], Christopher Moscatiello ["Moscatiello"], and the other petitioners were arrested on April 6, 1983.[2] Indictments were returned against them on April 20 of

[2] Appendix attached to this Petition for Certiorari, (hereinafter "A"), A-2 and A-31.

that year.[3] Trial began on January 23, 1984, some 278 days later."[4]

On May 9, 1983, Carter, Moscatiello and the other defendants filed various pre-trial motions.[5] These motions divided into two categories: motions to suppress the evidence seized, and non-suppression motions such as "motions for severance, for orders *in limine*, for election of counts, and for controlling the sequence of the government's presentation of evidence."[6]

"On October 17, the district court completed hearings on the several motions to suppress. . . and took them under advisement. The court decided these motions on December 23, 1983."[7] Of the sixty-seven (67) days these motions were undecided, "the district court excluded the 30 days between October 17 and November 16, as time during which the motions to suppress 'were actually under advisement by the court'."[8] See 18 U.S.C. §3161(h)(1)(J). No continuance was sought or granted for the remaining thirty-seven (37) days. The trial judge ruled that "[t]he period November 16 to December 23, was not excludable by reason of the pendency of the motions to suppress."[9]

While the motions to suppress were under advisement, the District Court ruled on the remaining motions. This occurred on December 21, 1983, two days before the suppression motions were decided.[10]

Trial began on January 23, 1984.[11] Before trial, a Motion to

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[3] A-5; A-48. The defendants were charged with violations of 21 U.S.C. 841(a)(1), (b)(6) and 846, and 18 U.S.C. 2, which provided jurisdiction to the District Court. See Supreme Court Rule 21.1(i).

[4] A-5.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] A-49.

[10] See docket entries for 12/21/83 on page 9 of Carter docket sheet, A-59; docket entry for 12/21/83 on page 7 of Moscatiello docket sheet at A-61; and docket entries for 12/21/83 on Rooney docket sheets at A-63.

[11] A-5.

Dismiss was filed under the Speedy Trial Act. The Motion was denied on February 10, 1984,[12] after the trial was completed.

In its Memorandum on the Speedy Trial Motion the District Court excluded the additional thirty-seven (37) days that the suppression motions were pending.[13] The trial judge held that he "did not consider. . .[the non-suppression motions] or take them under advisement until after. . .[he] had decided the motion to suppress on December 23, 1983."[14] In fact, as noted earlier, these motions had been decided on December 21, two days earlier.[15] Based on this mistaken sequence, the District Court reasoned that from the time of filing these motions, May 9, until the time they were first allegedly considered, December 23, was excludable as reasonably necessary to process the non-suppression motions to the point where they could be taken under advisement. 18 U.S.C. §3161(h)(1)(F)[16]

As a result of excluding these additional thirty-seven days, the number of non-excludable days from indictment to trial was reduced to forty (40).[17] If these additional days are restored, the time from indictment to trial would be over seventy (70) days, and the Speedy Trial Act would have been violated.

On appeal, the First Circuit initially upheld the exclusion of these additional thirty-seven days on the basis set forth by the District Court. The Court of Appeals overlooked Carter's

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[12] A-48.

[13] A-50.

[14] A-49.

[15] See note 10.

[16] "The following periods of delay shall be excluded. . .in computing the time within which the trial of any such offense must commence:

* * *

(F) delay resulting from any pretrial motion from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

* * * "

[17] A-50.

argument that the non-suppression motions were decided on December 21,[18] and accepted the District Court's mistaken December 23 date.[19]

In addition, the First Circuit also adopted the District Court's rationale for excluding the additional thirty-seven (37) days.[20] Thus, the Court of Appeals endorsed a standard that additional time be excluded while a motion is being considered, under a test of reasonableness,[21] and that this exclusion can be ordered retroactively, after the trial is over.[22] Carter again raised these issues in a Petition For Rehearing and a Petition

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[18] Brief for Appellant Carter, pages 40-41, A-65 to 66, ("But the record reflects that these other motions were decided on December 21, 1983, two days before the Motion to Suppress was decided," citations omitted). See also Reply Brief for Carter at page 10, A-67 ("Thus, for the other motions, e.g. severance, etc., the trial court had 225 days [May 9, 1983-December 21, 1983] for deciding these."). All of the other Petitioners joined in Carter's appeal of the Speedy Trial issues.

[19] A-5, A-9.

[20] A-9.

[21] "And while the time spent deciding the suppression motions was greater than the 30 days for which credit is automatically allowed under 3161(h)(1)(J), it was not *unreasonable*, in light of their multiplicity and obvious complexity (as reflected, infra, in the present opinion)." Slip opinion at 11, A-9 (emphasis not in original.).

[22] The suppression motions were filed on May 9, 1983; hearings were completed on October 17; and the decision was issued on December 23. Slip opinion at 6, A-5. Since no continuance had been sought or granted, the only excludable time was from October 17 to November 16, "under §3161(h)(1)(J)." Slip opinion at 10, A-8.

On January 23, 1984, the day trial began, the Motion to Dismiss on the basis of the Speedy Trial Act was filed. A-48. On February 10, 1984, after the trial was completed, the District Court denied the Motion, and issued an Opinion. *Id.* For the first time, in that February order, the trial court excluded up to December 23, 1983, the day the Suppression Motions were denied, on a theory of reasonableness. A-49. Therefore, this exclusion was ordered on February 10, 1984, retroactively to cover November 17 to December 23, 1983. Every Circuit that has considered this issue has held that a District Court is without authority to *retroactively* grant a continuance beyond the thirty days permitted in (h)(1)(J). *United States* v. *Tunnesen*, 763 F.2d 74, 77-8 (2nd Cir. 1985); *United States* v. *Carey*, 746 F.2d 228, 230 (4th Cir. 1984), *cert. denied* 105 S.Ct. 1398 (1985); *United States* v. *Frey*, 735 F.2d 350, 352-3 (9th Cir. 1984); *United States* v. *Janik*, 723 F.2d 537, 545 (7th Cir. 1983); and *United States* v. *Brooks*, 697 F.2d 517, 521-2 (3rd Cir. 1982).

For In Banc Consideration.[23] These were both denied on October 31, 1985. A-83 to A-86.

In its order denying the Petition for Rehearing the Court of Appeals did two things. First, it never addressed the fact that it relied upon December 23, 1983, as the date the non-suppression motions were decided, even though the uncontradicted evidence in the record is that these were ruled upon on December 21, 1983. *Compare* A-70 to A-73 with A-84 and A-87. Second, the Court did rewrite portions of pages 11 and 12 of the slip opinion. See A-84. To make these changes easier to follow, the Appendix contains amended pages 11 and 12 of the slip opinion with the changes entered on October 31, 1985 underlined. A-87 to A-88.

The thrust of the changes addressed the rationale for excluding some or all of the sixty-seven days that the suppression motions were under advisement, October 17-December 23, 1983. In both the original and the revision the first 30 days, October 17 to November 16, are excluded under §3161(h)(1)(J). A-8. The changes affect the next thirty-seven (37) days, November 17 to December 23. In the original. all of these days were excluded under §3161(h)(1)(F), as the period "during which the remaining (non-suppression) motions were pending." A-9. The opinion went on to reason that the additional thirty-seven (37) days spent in deciding the suppression motions "was not unreasonable," *id.* Since the Court of Appeals held that it was "reasonable for the [District] Court to have withheld decision on these motions until it could decide the suppression motions," *id.* the full sixty-seven days was excluded, and the First Circuit 'conclud[ed] that the total non-excludable time amounted to 45 days," well within the 70 day limit of the Speedy Trial Act. *Id.*

In the amended version, the Court concluded "that the total non-excludable time did not exceed 70 days." A-84, A-88. The

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[23] Copies of the Petitions are included within the Appendix at pages A-70 to A-82. Again, all of the other Petitioners joined in Carter's raising of the Speedy Trial issues.

twenty-five days difference results from the Court of Appeals now reasoning that "at least part of the period through December 23, 1983" is excludable. A-84, A-87.

In the process of seeking to avoid one obvious defect of the holding that the Speedy Trial Act was not violated, the revisions reflect even more clearly that there is no sound basis for avoiding this conclusion. The Court added two sentences to set forth the new rationale. The first admitted that the additional thirty-seven (37) days can not be excluded for deciding the suppression motions under (h)(1)(J).[24] Next, the Court simply subtracted whatever time "...must be excluded to avoid a violation of the Act..." A-84, A-87.

The non-suppression motions were filed on May 9, 1983, A-5 and were decided on December 21, 1983. A-59, A-61, A-63 through A-64. Of these 217 days, the Court of Appeals excluded from May 9, 1983, until November 21, 1983, 195 days. The latter date is obtained by taking November 16, 1983, when the 30 days excluded under (h)(1)(J) ends, A-8, and adding the five days the Court needed to "exclude[ ] to avoid a violation of the Act." A-84, A-87. However, once the rationale is abandoned that the suppression motions had to be decided *in order to decide* the non-suppression motions, it is clear that standing on their own the non-suppression motions did not require 195 days to be decided. See n. 29 *infra*.

Reasons for Granting the Writ

In the final version of its opinion, the Court of Appeals abandons any effort to rationalize a basis for the length of time it excludes for the disposition of these routine non-suppression motions. It merely notes that by exempting from May 9, 1983 through November 21, 1983, enough time is "...excluded to avoid a violation of the [Speedy Trial] Act..." A-84, A-87. The path followed to reach this goal amply demonstrates that there is no justification for deducting all of these 195 days to

[24] "This is not to say, of course, that more than 30 days can be *excluded* under section 3161(h)(1)(J) for deciding the suppression motions." A-84, A-87. (emphasis in orginal).

decide routine pre-trial motions. What is at work here is nothing more than a single-minded desire to rule that there was no violation of the Speedy Trial Act.

In the initial slip opinion issued on August 26, 1985, the Court of Appeals held that the non-suppression motions "were not decided until on or after December 23, 1983" A-5, and that they were not decided until the District Court "could decide the suppression motions," A-9, i.e. it was necessary to decide the suppression motions *in order to decide* the non-suppression motions.

Appellants had argued in their intial briefs and in the Reply Briefs to the First Circuit that the record in the District Court contradicted this rationale; that the record showed that the non-suppression motions were decided on December 21, 1983, two days before the suppression motions were decided. A-65 through A-67.[25] The Court of Appeals ignored the District Court record. It asserted that these non-suppression motions "were not decided until on or after December 23, 1983." A-5.

Carter, Moscatiello, and the other petitioners, filed both Petitions For Rehearing and Petitions For In Banc Consideration. All again joined in Carter's presentation on *when* the non-suppression motions were decided. In both of Carter's Petitions it was noted that the docket sheets reflected that these

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[25] But the record reflects that these other motions were decided on December 21, 1983, two days before the Motion to Suppress was decided. Trial Transcript 2—3, lines 21-24; page 9 of docket sheet, entries for 12/21/83, attached to this [Carter's] brief. Since these other motions, e.g. severance, were decided before the suppression motion, the resolution of the latter was clearly not necessary, let alone 'reasonably necessary,' to address the former. On this basis alone, these additional 35 days were not excludable; 75 non-excludable days elapsed from indictment to trial; and the Act was violated." A-65

In his Reply Brief, Carter again picked up this theme.

"All of these motions were filed on May 9, 1983. Other than the Motions To Suppress and Dismiss, none of the others required a hearing prior to determination. Thus, for the other motions, e.g. severances etc. the trial court had 225 days [May 9, 1983—December 21, 1983] for deciding these." A-67.

All of the remaining petitioners, Moscatiello, Rooney and Murray, joined in Carter's Speedy Trial issues.

motions were decided on December 21, 1983;[26] that during the trial, the District Judge stated that this was the date;[27] and that on the docket sheets the calculations of excludable time *ended* with December 21:

> "Judge Skinner understood very well that for purposes of the Speedy Trial Act the relevant date was 12/21/83. Though it was not so noted on all of the Appellant's (sic) docket sheets, a calculation of excludable time for these non-suppression motions was made on Appellant Rooney's docket entries. It recites that the '[e]xcudable delay... ended on 12/21/83.' See C.A. 127, last two notations for 12/21/83." Carter's Petition For Rehearing A-71 to A-72. *See also* Carter's Petition for In Banc Consideration A-81 and Docket Sheet, A-63, docket entry 276.

Faced with these arguments being pressed a second time, the First Circuit sought both to avoid the issue, and at the same time to neutralize its impact. The Court of Appeals did not change the recitation that the non-suppression motions were decided after the suppression motions were resolved. A-5, A-87.[28] However, it amended the opinion so as to exclude

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[26] A-70 to A-71 (Petition For Rehearing); and A-81 (Petition for In Banc Consideration). *See also* A-59, A-61 and A-63 through A-64 (Carter, Moscatiello and Rooney docket sheets).

[27] A-71 (Petition for Rehearing) and A-81 (Petition For In Banc Consideration).

[28] "Also pending before the court on October 17 were motions for severance, for orders *in limine*, for election of counts, and for controlling the sequence of the government's presentation of evidence, all of which were also filed on May 9; no hearing was held on these latter motions, *which were not decided until on or after December 23, 1983.*" (Emphasis added). A-5.

"We agree that *at least part of* the period through December 23, 1983, during which the remaining (non-suppression) motions were pending was excludable under §3161(h)(1)(F) *in respect to those particular motions.*" A-87. (emphasis is on language added to the original opinion by the First Circuit's order of October 31, 1985, "On Petition For Rehearing.").

only part of the last 37 days that the suppression motions were under advisement. A-87. By so doing, the First Circuit silently abandoned its former rationalization for holding that the Speedy Trial Act was complied with, and embraced a new one. The rationale that the suppression motions had to be ruled upon first in order to decide the non-suppression motions is repeated, but is no longer relied upon. When this was the rationale there were only 45 non-excludable days for purposes of the Speedy Trial Act. A-9.

In its amended Opinion, the First Circuit ruled that section 3161(h)(1)(F) ("delay. . . from the filing of the [pretrial] motion through the. . . prompt disposition of, such motion;") justified excluding the 195 days from May 9, 1983 (date of filing) until November 21, 1983, the date when time stopped being excluded. Since the date of *actual* disposition was December 21, 1983, this calculation does not fall within the literal language of the statute. Rather, as the First Circuit itself stated, November 21 was chosen because it is the date needed "to avoid a violation of the Act." A-84; A-87.

What is revealed by the amended opinion is that the First Circuit's reasoning is almost identical to the majority's holding in *United States* v. *Henderson*, 746 F.2d 619 (9th Cir. 1984), *reh. denied*, 3/7/85, *cert. granted*, 54 U.S.L.W. 3242 (84-1744, 10/15/85), in which review has been granted by this Court. In *Henderson*, the Ninth Circuit majority held that it is proper under the Speedy Trial Act to "exclude[ ] all of the time during which pretrial motions were pending," irrelevant of whether the passage of time while the motions were pending is " 'unreasonable.' " *Henderson*, *supra*, at 623. Here, the First Circuit excludes the time from filing until the date that is needed "to avoid a violation of the Act," A-87, again irrelevant

of whether this passage of time is " 'unreasonable'." One hundred and ninety-five (195) days were clearly not needed to decide these routine motions.[29]

A review of the present case provides this Court with the opportunity to emphasize a critical point, based on the actual facts of a case. If *Henderson* is reversed, it will not be merely because there is no magic in the date when pre-trial motions are finally disposed of, or taken under advisement. The true test is whether the passage of time since the motions were filed has a bearing upon or is reasonably necessary to arriving at the point where a hearing can be held, or the motions can be ruled upon. What this case offers to complement *Henderson* is that here time stopped being excluded a month before the motions were disposed of, and nonetheless the date selected had no relevance to reaching the point where the motions could be decided.

While the First Circuit has held that it will only exclude "such delay as is reasonably necessary from the time of filing a pre-trial motion to the time of concluding a hearing on it or

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[29] Because of the initial confusion by the District Court and the Court of Appeals about the dates on which the non-suppression motions and the suppression motions were decided, there is no indication in the record as to how much time the District Court spent deciding the non-suppression motions, i.e. did the trial judge first look at these non-suppression motions on December 19, and decide them on December 21? However, there is indication that the First Circuit's assessment was that these were routine matters that required little time to resolve. The Court of Appeals held that the suppression motions were decided on December 23; that the non-suppression motions were decided after the suppression motions; and the date of decision was "on or after December 23, 1983." A-5. If it was "on" December 23, then the length of time to reasonably process the non-suppression motions was one day. If the decision date, as then understood by the First Circuit, was "after December 23, 1983," it was not long after. The decisions were entered on the docket sheets on January 24 and 25, 1985. See A-59, A-61, and A-63 through A-64, docket sheets and A-71, Carter's Petition For Rehearing. This is about a month later. Whether it took a day or a month to reasonably process these routine motions, it clearly did not require the six and a half months (195 days) excluded by the First Circuit.

completing submission of the matter to the court for decision,"[30] it did not even attempt to apply this test to the 195 days in the present case. This serves to underscore the need for reviewing this case in conjunction with *Henderson*. If this Court reverses *Henderson* for failure to apply a test of reasonable necessity, then a remand to the First Circuit to apply the test in this appeal will highlight a critical principle: a court can not merely recite the rule by rote, and then seek to avoid its impact by picking a date prior to when the motions are ruled upon, but late enough "to avoid a violation of the Act." In order for the enforcement of the Speedy Trial Act to have teeth, motions which can be processed in a month, see n. 29, cannot be permitted to generate six and a half months of excludable time.

For the same reasons that resulted in this Court's granting certiorari in *Henderson*, certiorari should be granted here, and the cases consolidated for review.

Conclusion

The decision of the First Circuit, if allowed to stand, will provide a means for courts throughout the country to circumvent the Speedy Trial Act. The amended version of the opinion endorses the view that courts can exclude whatever time "must be excluded to avoid a violation of the Act."

The practices approved in the present case will create a gaping loophole in the Act that will undermine its very purpose. This question is of such substantial importance to the administration of the Speedy Trial Act that this Court should exercise its discretion in favor of granting certiorari to review and reject this practice now. This can be accomplished by consolidating the present case with the *Henderson* case taken for review in October.

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[30] *United States* v. *Mitchell*, 723 F.2d 1040, 1047 (1st Cir. 1983).

Respectfully submitted,

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DATED: December 26, 1985

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United States Court of Appeals
For the First Circuit

No. 84-1192

UNITED STATES OF AMERICA,

APPELLEE,

v.

CHRISTOPHER MOSCATIELLO,

DEFENDANT, APPELLANT.

No. 84-1193

UNITED STATES OF AMERICA,

APPELLEE,

v.

JOHN M. ROONEY,

DEFENDANT, APPELLANT.

No. 84-1262

UNITED STATES OF AMERICA,

APPELLEE,

v.

JAMES D. CARTER,

DEFENDANT, APPELLANT.

No. 84-1263

UNITED STATES OF AMERICA,

APPELLEE,

v.

MICHAEL F. MURRAY,

DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WALTER JAY SKINNER, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
BREYER, *Circuit Judge*,
and WEIGEL,* *Senior District Judge*.

Daniel J. O'Connell with whom *Eileen D. Vodoklys* was on brief for appellant Christopher Moscatiello.

Martin G. Weinberg with whom *Kimberly Homan* and *Oteri, Weinberg & Lawson* were on brief for appellant John M. Rooney.

Marshall D. Stein with whom *Cherwin & Glickman*, *Brian J. McMenimen* and *Gargiulo & McMenimen* were on brief for appellant James D. Carter.

A. Raymond Randolph with whom *Christopher L. Varner* was on brief for appellant Michael F. Murray.

Gary C. Crossen, Assistant United States Attorney, with whom *William F. Weld*, United States Attorney, was on brief for appellee.

August 26, 1985

CAMPBELL, *Chief Judge*. Defendants appeal from criminal convictions on drug charges.

During the first part of 1983, federal agents received information implicating defendants-appellants John M. Rooney, Christopher Moscatiello, James D. Carter, and Michael F. Murray, as well as Arthur Barrett and Stephen King, in a conspiracy to possess and distribute illegal drugs. That information was corroborated by information received from law enforcement officials in the Boston area and by spot surveillance conducted by federal agents from the summer of 1982 to April 1983. On April 6, 1983, agents concluded from the pattern of vehicular activity that defendants were observed to engage in that a sale of drugs was imminent. Accordingly, they arrested them on the afternoon of April 6, and conducted searches of a green Dodge camper, a white Ford truck, a garage at 15 Sylvester Road, Dorchester, Massachusetts, and a warehouse at

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* Of the Northern District of California, sitting by designation.

345 D Street, South Boston, Massachusetts. All four searches uncovered large amounts of baled marijuana.

Moscatiello, Rooney, Carter, Murray, and Barrett were charged two weeks later in a five-count indictment for various drug violations. Counts I and III charged Murray, Carter, Rooney, and Barrett with possessing and conspiring to possess more than one thousand pounds of marijuana in violation of 21 U.S.C. §§841(a)(1), 841(b)(6), 846. Counts II and IV charged Murray, Carter, King, and Moscatiello with separate counts of possession and conspiracy in violation of the same provisions of the United States Code. Murray and Carter were charged in Count V with yet another count of conspiracy in violation of 21 U.S.C. §846. In a superseding indictment, Murray's brother Joseph was added to all five counts.

Appellants moved to suppress the evidence seized in the vehicular and building searches. These motions were denied in a memorandum dated December 23, 1983. Trial was set for January 23, 1984. On that date, appellants joined in a motion to dismiss for violation of the Speedy Trial Act. The court, after a preliminary review of the motion and with acquiescence of counsel, reserved its ruling and directed the parties to proceed to trial; the court denied the motion on February 10, 1984. On January 23, Rooney and Moscatiello entered conditional pleas of guilty to Count IV, reserving their objections to the court's rulings on the two motions. The other two appellants, Murray and Carter, were found guilty of Counts I and II, respectively, after a jury trial.

All four appellants appeal from the district court's denial of their motion to dismiss for violation of the Speedy Trial Act, as well as from the court's refusal to suppress the seized evidence. We affirm.

I. *The Speedy Trial Act*

The Speedy Trial Act, 18 U.S.C. §3161 *et seq.*, provides that the trials of defendants who plead not guilty shall com-

mence within 70 days of their indictment. 18 U.S.C. §3161(c). In computing the seventy-day period, the Act provides for certain exclusions as follows:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
>
> * * *
>
> (F) delay resulting from any pretrial motion from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;
>
> * * *
>
> (J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.
>
> * * *
>
> (8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 U.S.C. §3161.

Defendants were indicted on April 20, 1983. Trial began on January 23, 1984, some 278 days later. The parties are in agreement that 173 of those days are clearly excludable, leaving an excess of 35 days over the permitted 70.

The period whose excludability remains in controversy runs from October 17 to December 23, 1983. On October 17, the district court completed hearings on the several motions to suppress filed by the defendants on May 9, and took them under advisement. The court decided these motions on December 23, 1983. Also pending before the court on October 17, were motions for severance, for orders *in limine*, for election of counts, and for controlling the sequence of the government's presentation of evidence, all of which were also filed on May 9; no hearing was held on these latter motions, which were not decided until on or after December 23, 1983.

Pursuant to 18 U.S.C. §3161(h)(1)(J), the district court excluded the 30 days between October 17 and November 16, as time during which the motions to suppress "were actually under advisement by the court." Appellants object on the ground that the court made no showing that it was actually considering the motions on every one of the excluded 30 days.

Arguing that such a showing is necessary for an exclusion under §3161(h)(1)(J), appellants direct our attention to the report of the Senate Judiciary Committee, accompanying the Senate version of the Speedy Trial Act of 1974. The Committee amended the bill to exclude time "reasonably attributable to delays during which a matter is actually under advisement," S. Rep. NO. 1021, 93d Cong. 2d Sess. (1974), *reprinted in* A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974, at 104 (1980), in response to a suggestion by the Justice Department that the Committee resolve an ambiguity in the bill's original language as to the time covered by the exclusion for a "proceeding concerning the defendant." The Committee report cautioned that the Committee did not intend:

> "in adopting this amendment to give a blanket exception to matters under advisement[,] for the time excluded must be 'reasonably attributable' and the matter must be 'actually under advisement.' Therefore, the judge must be actually considering the question, for example, conducting the research on a novel legal question."

Id.

Appellants would have us conclude from this that, absent precise judicial findings showing that the court had actually spent each of the days sought to be excluded working on a motion, the exclusion is not allowable.

Like the Eleventh Circuit, we are not persuaded by this argument. *See*, *United States* v. *Mers*, 701 F.2d 1321, 1338-39, *cert. denied*, 104 S.Ct. 481 (1983). The "actually under advisement" language in the statute, and the phraseology of the Committee report, do not specify that, in addition to having a matter under advisement, the court must demonstrate that it was working on it each of the days sought to be excluded. Such a requirement would be unprecedented and impracticable. It is, moreover, belied by other parts of the legislative history. The language of the Senate bill was amended before passage by the House of Representatives, which added the phrase, "not to exceed thirty days" to §3161(h)(1)(J). According to the report prepared by the House Committee on the Judiciary,

> [t]he amendment was adopted at the suggestion of Detroit defense attorney Mr. Barris, who said:
>
> > Now, I think the language which is now contained within the bill is that a reasonable time should be allowed when a matter is held under advisement by the district judge. This, of course, is a very flexible term, term "reasonable," and I would suggest that a period of 30 days after all oral argument is heard and all briefs have been submitted on the matter under advisement is not an unreasonable period in which the district judge could act, I do not think that

> this would compel the judge to reach on any particular issue an improvident answer merely because he is held to a time limit of 30 days. And yet, if such a provision or restriction were written into the Act, it would effectively plug up one of the loopholes which I conceive to now exist whereby a district judge were he prone to do so, could well "sit on a matter" for an indefinite period of time and thus rather effectively defeat the purposes of the bill.
>
> The Committee concurs with the views of Mr. Barris and also with the Alaska Speedy Trial Rules of Court, which provide that no pre-trial motion shall be held under advisement for more than 30 days. This modification in no way affects the prerogative of the court to continue cases upon its own motion where, due to the complexity or unusual nature of the case, additional time is needed to consider matters before the court, as set forth in section 3161(h)(8). It should also be noted, however, that in such cases the court must set forth with particularity reasons for granting such a motion.

H. Rep. No. 1508, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 7401, 7425-26.

Two conclusions emerge from a reading of this part of the report. First, the House Committee understood the Senate bill to permit a judge to "sit on" a proceeding indefinitely, an interpretation incompatible with an understanding of the "actually under advisement" language that would only allow the exclusion of time actually spent on research, writing, or reflection. Second, the Committee contrasted delays of less than 30 days under the present §3161(h)(1)(J) with further delays excludable only under the continuance provision of §3161(h)(8); in the latter case, the Committee notes, "the court must set forth with particularity reasons for granting such a motion." We infer that no elaboration of findings or of reasons was thought to be required for §3161(h)(1)(J) exclusions, which were automatically limited by the 30 day period.

We accordingly hold that the full 30 days between October 17 and November 16, during which the suppression motions were under advisement is excludable under §3161(h)(1)(J). This still leaves the total on nonexcluded days at 75, or 5 over the statutory limit. The district court explained its exclusion of the remaining time until the suppression motions were decided on December 23, 1983, as follows:

> The defendants had also filed a large number of other motions, for severance, for orders *in limine*, election of counts, and for controlling the sequence of the government's presentation of evidence. These motions were pending during consideration of the motions to suppress evidence.
>
> No hearing was held before me on these matters. I did not consider them or take them under advisement until after I had decided the motion to suppress on December 23, 1983. They are therefore not subject to the thirty day provision of §3161(h)(1)(J) but to the reasonable time requirement implicit in §3161(h)(1)(F)....
>
> These motions primarily concerned the ordering of the trial. The summary judgment [sic] motion, however, was dispositive. If it had been allowed, the government would not have been able to go forward with trial. I conclude that it was reasonable to hold these motions until I had decided the motion to suppress.
>
> Even though the motion to suppress was under advisement for longer than the permitted *excludable* time of thirty days, it was not held an unreasonable time in my view given the complexity of the testimony and the difficulty of determining the extent to which subjective judgment, albeit expert, should support a finding of probable cause. While the Speedy Trial Act is intended to discourage obsessional delay, it should not be interpreted to discourage thoughtful consideration by the district judges of difficult questions.

We agree that the period through December 23, 1983, during which the remaining (non-suppression) motions were pending was excludable under §3161(h)(1)(F). It was reasonable for the court to have withheld decision on these motions until it could decide the suppression motions. These remaining motions, as Judge Skinner stated, "primarily concerned the ordering of the trial." Had the suppression motions been sustained, the prosecution might not have had sufficient evidence to go forward, rendering the procedural motions moot. And while the time spent deciding the suppression motions was greater than the 30 days for which credit is automatically allowed under §3161(h)(1)(J), it was not unreasonable, in light of their multiplicity and obvious complexity (as reflected, *infra*, in the present opinion.)

This case is on all four with our recently decided case of *United States* v. *Anello*, No. 84-1406, slip. op. at 8-11 (1st Cir. June 20, 1985), where we excluded time in excess of 30 days reasonably spent in deciding multiple suppression motions that as a practical matter had to be decided prior to other pending motions. Following *Annello*, we affirm the district court's exclusion of such time here.

We conclude that the total nonexcludable time amounted to 45 days, and that the Speedy Trial Act was not violated.

II. *Search and Seizure Issues*

Critical to the resolution of this appeal is a determination of whether there was probable cause to seize or search without warrant the two vehicles at issue—a green camper and a white truck, and by extension, whether there was probable cause to issue search warrants for two buildings—a garage and a warehouse. First, we will set forth a brief summary of the key events of April 6, 1983, the day the contested searches and seizures took place, based on fact findings of the district court.

At approximately 2:25 p.m., federal agents stopped a green Dodge camper driven by Moscatiello and a red Cherokee jeep

driven by King at the Allston Toll Plaza on the Massachusetts Turnpike. Both defendants were placed under arrest. Upon entering the cab of the camper to move it to the roadside, DEA Special Agent Powers observed through a rear window of the cab that the camper area contained burlap-covered bales, which he knew to be a common packing for marijuana. Powers immediately broadcast to the other agents his observation of the bales. The camper was then impounded, a search warrant was eventually obtained, and a search of the bales pursuant to this warrant disclosed that they indeed contained marijuana.

At 2:30 p.m., Rooney, who had been followed from the Northern Avenue area, drove a white Ford truck into the driveway of a garage. As Rooney got out of the vehicle he was placed under arrest. One of the agents on the scene indicated he noticed an odor of marijuana coming from the truck. Another agent removed a set of keys from Rooney's hands at the time of his arrest and DEA Special Agent Boeri used one of the keys to unlock the rear door of the truck. Upon opening the door, the agent observed approximately 60 bales of marijuana. After the agents seized the car, the bales were examined some 18 hours later, without obtaining a warrant in the interim. and white truck, federal agents later obtained a warrant to search the garage at 15 Sylvester Road.

During the course of the April 6 surveillance, federal agents observed the white truck and green camper enter the cinder block warehouse at 345 D Street, then exit some 20 minutes later. Agents at that time also observed two men inside the building. After seizing the truck and camper, as well as the blue van shortly after the seizure of the camper, and after arresting the occupants of those vehicles, Carter, Murray, Rooney, and Moscatiello, agents converged on the warehouse. There they observed a short white male, approximately 45 years old, pacing back and forth on D Street in front of the white cinder block building, looking at traffic as it passed.

After agents drove around the block, the man was no longer seen outside the building.

At approximately 2:40 p.m., other agents arrived on the scene and attempts were made to determine if anyone was in the building at 345 D Street by knocking and then banging on the entry door and on the large, overhead doors. Agents went around the building to look through a window but could not see the general interior of the building. At all stages of this process, the agents regularly stated their identities as federal law enforcement agents. Finally, the agents made a forced entry of the building. After a brief view of the premises, they determined that no one was inside, detected a strong odor of marijuana, and observed many burlap-wrapped bales which they believed to contain marijuana. The building was then secured and guarded from the outside.

A search warrant for the warehouse was executed at 11:00 p.m. that evening. In their application to the magistrate for the warrant, the agents disclosed and relied *inter alia* on their search of the truck and their seizure of the camper, but neither disclosed their forced entry into the warehouse nor made use of the fruits of that entry. The later search of the warehouse pursuant to the warrant uncovered in addition to the marijuana, a red and a blue spiral notebook, tape dispensers, marking pens, and marked pieces of tape that had been affixed to the bales of marijuana.

A. *Vehicle Searches*

Appellants Moscatiello and Rooney contend that both the warrantless stop and seizure of the green camper and the stop and search of the white truck violated the fourth amendment, and that therefore, the bales of marijuana found in those vehicles should have been suppressed as tainted fruits of those searches. We find no merit in this contention. We agree with the court below that when the agents stopped and entered the green camper, they had probable cause to believe that contra-

band was being transported in it and were therefore empowered both to stop and search it under the so-called automobile exception to the warrant requirement under the fourth amendment.[1] *See e.g., United States* v. *Ross*, 456 U.S. 798, 825 (1982); *Carroll* v. *United States*, 267 U.S. 132 (1925). Armed with the additional evidence of marijuana in the green camper, the agents had ample probable cause to search the white truck as well.

In viewing the district court's determination of probable cause, we of course look at the facts in the light most favorable to the court's ruling and accept the court's findings unless they are clearly erroneous. *See United States* v. *Patterson*, 644 F.2d 890, 894 (1st Cir. 1981); *United States* v. *Jobin*, 535 F.2d 154 (1st Cir. 1976); 3 C. Wright, *Federal Practice and Procedure* §678, at 805 & n. 24 (2d Ed. 1982) (citing cases). To find probable cause, a court can rely on an "assessment of probabilities in particular factual contexts" that criminal activity may be taking place. *Illinois* v. *Gates*, 462 U.S. 213, 232 (1983). Here the district court relied on the totality of the circum-

[1] In his brief, Moscatiello argues from the district court's consistent reference to the "search" of the white Ford truck and the "seizure" of the green Dodge camper, that the court rejected the government's assertion that it had probable cause to *search* the camper before federal agents seized it at the toll plaza. We find no merit in the contention. The court doubtless distinguished the "search" of the white Ford truck from the camper because the former was searched immediately while the latter was not fully searched until a warrant was obtained. But there is no reason to distinguish the facts which would provide probable cause to seize the vehicle from those which would provide probable cause to search it: for both purposes it was necessary to find that it was likely being used to transport illegal drugs.

Moscatiello also reads the court's conclusion that it was "persuaded that the officers were justified in arresting the defendants, searching the white Ford truck and seizing the green Dodge camper" as equating the question whether there was probable cause to seize the camper with whether there was probable cause to arrest Moscatiello. Moscatiello then tries to show that the agents lacked probable cause to arrest him. We see no reason to consider the arrest question. As there was probable cause to have seized and searched the vehicle in which he was riding, the court had ample basis for refusing to suppress the contraband which was discovered in the camper.

stances—reliable informant information linking the various codefendants to an ongoing drug ring, coupled with detailed surveillance observations of suspicious vehicular activity—to establish probable cause. While the district judge noted that neither class of evidence would have sufficed by itself, put together they made a strong case for finding probable cause.

The informant evidence came from three separate sources. Informant Glen Castro described his own personal involvement in conversations and drug transactions with Rooney and Barrett during the first part of 1982. These included Rooney's delivery to Castro of a bale of marijuana, a conversation with Barrett, where Barrett described the counting of $1 million in drug money, a conversation with Barrett where Barrett indicated he was in charge of a drug operation (at this meeting some $700,000 was in plain view), and generally, the joint involvement of Rooney, Barrett, and others in drug traffic.

A second informant, who had provided reliable information to the FBI in the past, told an agent that Barrett was selling marijuana and cocaine out of his home in April, 1982, and had a large supply of both drugs in his livingroom.

A third infromant, described conversations between Barrett and Joseph Murray in March, 1983, about an incoming marijuana shipment, and averred in a general way that Barrett was part of the "Joe Murray crew," a group known to the FBI as involved in various criminal activities. The third informant connected Barrett to a Ronald Barton, who had been arrested in connection with a purchase of marijuana from an undercover agent in February, 1983. The proposed plan involved the use of a rental truck as a means of transferring marijuana. Although Barton was not convicted, the informant said that he was in fact part of "Mr. Barrett's operation" for marijuana sales.

Rooney contests the reliability of the information the government gained from its informants. Rooney notes that the information provided by two of the informants concerned defen-

dant's activities in April, 1982, a year before their arrests. One of the two, Glen Castro, was serving time for bank robbery when he provided the information. The third informant's information concerned events in February and March of 1983, but the government had no independent confirmation of his reliability, and much of his information was single or multiple hearsay.

These objections are not persuasive. Although a convicted felon, Castro gave very detailed information, asserted to be from first-hand, the tenor of which was substantially corroborated by the two others. The second informant, who corroborated Castro's information as to Barrett, had a track record of reliability. Although both his and Castro's information concerned events in April, 1982, the association of Barrett and Rooney with Barton, who was arrested on an unrelated drug charge but later released, was confirmed by surveillance within a matter of months. While the third informant's information was mostly hearsay, it was not entirely so and was in some respects corroborated by the results of surveillance.

To be sure, the informants' evidence related to drug dealings sometime before the challenged searches. But it was verified and, as it were, updated by the surveillance evidence, which indicated that, right up to their arrests, Rooney and Barrett were up to their old tricks.

And the kind of criminal conduct related by the informers was not the kind which became stale overnight. As one court has stated:

> The likelihood that the evidence sought is still in place is a function not simply of watch and calendar, but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure opera-

> tional base), etc. The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed.

Andersen v. *State*, 24 Md. App. Ct. 128, 331 A.2d 78 (1975), *aff'd*, 427 U.S. 463 (1976).

The informant evidence in the present case is far more like a tortoise than a hare. A drug enterprise involving a network of suppliers, distributors, and customers is not created and then willingly dismantled the next day. Assuming, as the informants said, that defendants were operating out of a garage in South Boston, and were dealing extensively in marijuana, a valuable and bulky commodity, early in 1982, it would be reasonable to assume they were still doing the same a year later.

Verification through surveillance began as early as July or August of 1982. The informants' information as to the regular association of Rooney and Barrett was confirmed, as was their occasional association with Barton and with the Murrays. Meetings among Rooney, Barrett, Barton and the Murrays were observed in the vicinity of the Pier Restaurant on Northern Avenue. Independent information received from state and local officials in March, 1983, indicated that there was a warehouse somewhere in South Boston which was used to store marijuana, though several possible locations for the warehouse furnished by the officials proved to be inaccurate.

On April 5 and 6, 1983, the agents observed defendants to be engaged in a complex pattern of vehicular activity which included trips by the white Ford truck, the green camper and the blue van, to a garage and into a warehouse under circumstances suggesting that they were being loaded there, followed by trips under close escort of other vehicles to possible distribution points. The district court made detailed findings about these actions which we need not repeat here. It is enough to say

that defendants met with one another, on occasion exchanged vehicles and keys, and drove about in various combinations of vehicles. For example, the white Ford truck was observed to back up to a garage at 15 Sylvester Road, where objects were placed on either side of it, obstructing the view into the garage. When the truck left the garage it was closely followed by Barrett in an automobile, and when the truck stopped at Santoro's subshop, Barrett passed, did a U-turn, and parked by its side. A similar pattern consistent with the transport and delivery of some highly valued substance occurred with respect to the blue van and, later, the white Ford truck and green camper, this time at a cinder block building, the doors of which were opened to admit the vehicles by persons inside, and then closed. A tractor tractor rig was observed inside with a large dark colored container on top. Certain agents who testified at the trial opined, in light of specialized knowledge of drug trafficking, that certain of the observed practices, *e.g.*, the following of the trucks by an escort car at such a close distance as to prevent the intervention of another vehicle, were typical of drug operations. Nothing suggested that defendants were engaged in an ascertainable legitimate business.

In the context in which it arose, the surveillance evidence provided convincing *indicia* of drug trafficking. Given the informants' evidence that Barrett, Rooney and the Murrays had been dealing in marijuana and cocaine on a systematic basis, it provided powerful reason to believe that all defendants were doing precisely what, in fact, they were doing. Even an unsophisticated observer lacking the prior information would have suspected the actions of men rushing about in a mini-fleet of vehicles between a garage and warehouse in the manner described. Sophisticated observers, such as drug agents, were entitled to draw even more precise inferences, as "[c]onduct innocent in the eye of the untrained may carry entirely different messages to the experienced or trained observer." *United States* v. *Woolery*, 670 F2d. 513, 515 (5th Cir.) (quoting *United States*

v. *Clark*, 559 F.2d 420, 424 (5th Cir. 1977)), *cert. denied*, 459 U.S. 835 (1982); *accord United States* v. *Manchester*, 711 F.2d 458, 461 (1st Cir. 1983).

Rooney and Moscatiello question the basis for Agent Keaney's testimony that the traffic was of a kind frequently employed during the transportation of drugs. Moscatiello argues that no foundation was laid for Keaney's testimony to that effect; however, Moscatiello's brief itself cites to Keaney's testimony that he had conducted "numerous" vehicle surveillance, during several of which "multiple vehicles [were] used. . . for counter-surveillance [or] for security." Rooney suggests that the proper universe of experience is not all drug trafficking, in which the use of multiple vehicles for surveillance or security might indeed be common, but drug trafficking in the Northeast, where, to Keaney's own knowledge, no drug hijackings had occurred. But the fact that Keaney knew of no hijackings in the Northeast, does not imply that he could not infer that the second vehicles were serving a security or counter-surveillance function; whether or not hijackings were common, defendants might still regard the risk as worth protecting against, and it is hard to think of any innocent activity which would have induced such precautions.

Rooney argues that the vehicles used by defendants were occasionally seen travelling alone. We do not find these observations inconsistent with Keaney's theory, which only demands that vehicles travel in groups when actually transporting marijuana.

Rooney also makes other arguments, none of which we find convincing. We add that while the driving of vehicles in tandom undoubtedly strengthened the inference of drug smuggling, it was by no means the only basis for such an inference. The shuttling of vehicles back and forth from the garage and the cinder block warehouse, the entire modus operandi of a group at whose center were men who were known drug smugglers, could reasonably be explained only as the agents in fact did explain these actions.

Rooney contends that the government lacked probable cause, on the authority of *United States* v. *Freitas*, 716 F.2d 1216 (9th Cir. 1983), a case also involving multiple informants and corroborative surveillance. While the facts found insufficient to support a determination of probable cause in *Freitas* bear some resemblance to those in the present case, the quality of the informants' tips in *Freitas* was significantly inferior to that of Castro's, in that neither of the *Freitas* informants' tips disclosed the basis for its information; Castro, on the other hand, indicated that he himself had received drugs from Rooney. Since the court in *Freitas* noted that if an "informant [speaks] with personal knowledge, then the information is usually deemed reliable enough to support a finding of probable cause," *Id.* at 1221, it seems likely that the *Freitas* court, which found the probable cause determination a "borderline" one, *Id.* at 1224, would regard the fact that Castro indicated that he spoke from personal knowledge sufficient to tip the scales in the present case the other way. In any event, we are not necessarily bound by the views of the *Freitas* panel.

We conclude that there was ample probable cause for the stop and seizure of the green camper. It follows then that the same facts, with the addition of the sighting of the bales in the green camper, also furnished probable cause to search the white truck. The main argument which Rooney offers to distinguish the search of the white truck is that the vehicle was parked on private property at the time it was subject to a warrantless search. We find, however, that the fact of being parked on private property did not suffice to exempt the vehicle from being searched where probable cause otherwise existed.

Rooney finds some support for his position in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). In that case, defendant was arrested inside his home on murder charges, and his cars, which were parked on his driveway, were towed to the police station to be searched. In an opinion attracting only four votes, Justice Stewart held that the search of the impounded

car fell outside the automobile exception to the warrant requirement because, *inter alia*, the need to search the car did not arise suddenly at the time of Coolidge's arrest, objects sought were not contraband, the cars were unoccupied and on private property, and Coolidge could not have gained access to the vehicles to destroy evidence.

However, our case is clearly distinguishable. In sharp contrast to the facts in Coolidge, here the agents who arrested Rooney searched the truck immediately after pursuing the defendant to the garage site on the reasonable belief that it contained contraband. Moreover, Coolidge's car had been parked in the driveway of his own home, while Rooney was temporarily parked on property, which albeit private, was not *his* property; therefore, he cannot derive any greater expectation of privacy from that fact than if the vehicle had been parked in a public place. Although Rooney attempts to draw a bright line between vehicles on private property and those on public property, there is a clear distinction between a search of a car that the police had pursued onto private property and one that was long unoccupied and parked in a driveway for a period of time.

As the opinion in *California* v. *Carney*, 37 Cr.L. 3033 (1985), which extends the automobile exception to mobile homes, makes clear, the inherent mobility and pervasive regulation of vehicles, form the bases for a reduced expectation of privacy. *Carney*, rather than supporting the public/private distinction advocated by Rooney, merely confirms the special fourth amendment treatment accorded the search of vehicles.

Finally, although it is perhaps true that the FBI agents who arrested Rooney could have blocked off the driveway and immobilized the white truck, and so one of the reasons given in *Coolidge* for not permitting a warrantless search would apply here, the continued vitality of that particular reasoning is doubtful. That section of the *Coolidge* opinion commanded

only four votes. Moreover, the Court in *Ross*, in explaining how the rationale for allowing the warrantless *seizure* of an automobile—that it might be driven away before a warrant could be obtained extended to the *search* of the interior of its seats—found that the minimal increase in intrusiveness inflicted by searching a car immediately, instead of impounding it and seeking a warrant simply was not of constitutional significance. *Ross*, 456 U.S. at 807 n. 9.

We hold, therefore, that probable cause to believe that Rooney was using the white truck to transport contraband sufficed to support the seizure and search of the truck. Moreover, under *Ross*, a search of the entire vehicle, including, the examination of any closed container that may conceal the object of the search is permissible. *Ross*, 456 U.S. at 825. The fact that the bales found in the white truck were not examined until 18 hours later does not render the search illegal in light of the recent Supreme Court decision, *United States* v. *Johns*, 105 S.Ct. 881 (1985), holding that a delay of three days before searching containers from impounded trucks was reasonable. *See United States* v. *McHugh*, No. 84-1748 (1st Cir. 1985) (a search of bales of marijuana seven days after the seizure of the truck in which they were contained is permissible). We conclude that no violation of the fourth amendment was committed in the warrantless search and seizure of the white truck.

B. *Search Warrants*

Given the combination of the informant information and the corroborated surveillance, and since we hold that probable cause existed to search the white truck parked in the driveway of the garage, we also hold that there was ample probable cause to support the issuance of the warrant to search the garage itself and that the search pursuant to the warrant was permissible.

The issue of the validity of the search warrant for the warehouse, however, merits more discussion. In its Memorandum

and Order on Various Motions of the Defendants to Suppress and to Dismiss, the district court held that none of the defendants had standing to contest the legality of the search of the warehouse. The court also ruled that the warrant to search the warehouse was legal since it rested on a showing of probable cause that was independent of and untainted by the prior illegal entry, noting that the omission of any references to the earlier search in the affidavits did not affect the magistrate's decision by enhancing the affidavits' content. The court admitted not only the evidence discovered for the first time *after* issuance of the warrant but also evidence of the bales which were in plain view when the agents made their initial warrantless entry of the warehouse and, of course, remained there until a full search took place pursuant to the warrant that had been subsequently obtained.

Murray and Carter urge us to suppress all evidence seized in the warehouse as the product of an illegal search. They argue that they both had a reasonable expectation of privacy in the warehouse, and that therefore the trial court erred in holding that they lacked standing to contest the legality of the searches. They further assert that the search warrant for the warehouse was tainted by the agents' failure to mention the earlier warrantless search of the warehouse, requiring the suppression of all evidence seized at the warehouse; in the alternative, they argue that any evidence observed in plain view during the initial unauthorized entry, *i.e.*, the bales wrapped in burlap, must be suppressed as the direct product of a fourth amendment violation even if the later search made pursuant to the warrant was untainted. The Government contests each of these arguments, and in addition replies that exigent circumstances justified the entry into the warehouse without a warrant.

1. *Standing*

We believe the court erred in ruling that "[n]one of the defendants have standing to challenge the search of the ware-

house, which was owned by a corporation, in the absence of any evidence that any portion of the warehouse was set aside for the personal use of any defendant as corporate officer, employee or financial backer." The lower court's reasoning seems to have been that the fourth amendment affords a defendant no protection unless he either owned the warehouse personally or used some portion of it for his personal use. But there was ample evidence to indicate that Murray and Carter had "a legitimate expectation of privacy in the area searched." *E.g.*, *United States* v. *Salvucci*, 448 U.S. 83, 92 (1980).

In *Mancusi* v. *DeForte*, 392 U.S. 364 (1968), state officials, acting without a warrant, searched the union office shared by DeForte, a union official, and several other union officials. The Court rejected arguments that DeForte lacked standing to object to the admission of papers seized during the search because the place searched was not his home, or because he had no proprietary interest in his office, or because he shared the office with other officials. The court, per Justice Harlan, concluded that DeForte "could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups." *Id.* at 369.

In the present case, Murray testified that he, Murray's brother, and defendant Carter each put up $20,000 to acquire the warehouse and that the three of them, along with one William Rae, held the stock of Harbor Oil, Incorporated, the corporation that held title to the warehouse, although only the Murrays' names appear on the mortgage used to finance the rest of the warehouse's purchase price. Thus, Murray and Carter, unlike DeForte, had, through their close corporation, a proprietary interest in the searched premises.

More importantly, only the Murrays and Carter had keys to the warehouse, and they testified that the warehouse was kept locked, as agents found it prior to the warrantless search; the number of persons afforded access to the warehouse would

seem considerably smaller then the number of office mates, union superiors, and invitees that had access to DeForte's office. Murray and Carter also kept personal property in the warehouse, including a jacket found by the agents with $1,000 in the pocket (not to mention the large quantity of marijuana), further indicating an expectation of privacy. We therefore hold that Carter and Murray had standing to contest the search of the warehouse.

2. *Exigent Circumstances*

The Government replies that even if Carter and Murray have standing to contest the initial entry of the warehouse, exigent circumstances made the warrantless search and seizure legal; specifically, that, had the agents not entered when they did, they would have run a significant risk that evidence would have been destroyed before a search pursuant to a warrant could have been effected. We held in *Archibald* v. *Bosel*, 677 F.2d 5 (1st Cir. 1982), that law enforcement officials may conduct a warrantless search that would otherwise be illegal if they have a reasonable perception that exigent circumstances obtain. It is difficult, however, for us to deal with this issue on the record and findings as they presently stand. The district court made no findings on the question of exigency, and while we do not rule out all possibility that the risk of destruction of evidence inside the warehouse was so great as to allow a warrantless entry, the Government's position is uphill and, absent findings by the lower court, we are loath to conclude that exigent circumstances existed as now argued. We accordingly do not reach the Government's claim of exigency but turn directly, as did the district court, to the question of whether or not to suppress the evidence found in the warehouse on the assumption, *arguendo*, that the warrantless entry was in violation of the fourth amendment.

3. *The Exclusionary Rule*

Even assuming that the original, warrantless, entry into the warehouse was illegal, we are not required to invoke the exclusionary rule. Since *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920), the Supreme Court has recognized that evidence obtained through an independent, lawful source need not be suppressed even if the police were also led to it through means that violated the fourth amendment or some other constitutional guarantee. The theory behind this rule is clear: where the evidence was discovered through an untainted source and would have been discovered even if the illegality had not occurred, the evidence is not a fruit of the illegality. *Cf. United States* v. *Leon*, 104 S.Ct. 3405 (1984).

In *Segura* v. *United States*, 104 S.Ct. 3380 (1984), the Court was faced with a sequence of an illegal entry followed by a legal one strikingly similar to the present one. In *Segura*, New York Drug Enforcement Task Force officers investigating a cocaine ring stopped two of the suspects and found them to be carrying cocaine. Agents were then authorized to arrest petitioners Segura and Colon and secure Segura's apartment to prevent the distruction of evidence, even though, they were told, a search warrant probably could not be obtained until the next day. At 7:30 that evening, agents established external surveillance of Segura's apartment. At 11:15, Segura entered the lobby of the building. Agents then took him to his apartment and knocked at the door. When a woman later identified as Colon answered the door, agents entered the apartment without requesting or receiving permission, and without having obtained a warrant. Agents conducted security check of the premises, observing in the process several items of drug paraphernalia; none of the items found was disturbed. Agents took Segura and Colon to DEA headquarters, leaving two agents behind to secure the premises until a search warrant could be obtained. After the warrant was issued at 6:00 p.m. the following day, a search was conducted that turned up a kilo of cocaine and records of drug transactions.

At trial, the district court ruled that no exigent circumstances justified the initial entry. Finding the first entry illegal, and the evidence observed in the security search its direct fruit, it ordered that evidence suppressed. Although it found the warrant authorizing the later search to be valid, it also ordered the evidence found in the later search suppressed, since, but for the illegal entry and subsequent occupation of the apartment during the 19 hours between the initial entry and the issuance of the search warrant, the evidence might have been removed or destroyed; thus, the later-discovered evidence was also "fruit of the poisonous tree." On appeal, the second circuit affirmed as to the first evidence but reversed the holding requiring the suppression of evidence not in plain view, concluding that to indulge in the speculative possibility that the evidence might have been removed or destroyed to control the admissibility of the later evidence would be "prudentially unsound."

The defendants sought review in the Supreme Court solely on the question of whether the evidence uncovered during the later search should have been suppressed; the Government did not seek review. In the part of its opinion that commanded a majority, the Court simply held that:

> "[w]hether the initial search was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized. . . .
>
> . . . Had police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here. . . .
>
> . . . [O]ur cases make clear that evidence will not be excluded as 'fruit' unless the illegality is at least the 'but for' clause of the discovery of the evidence."

Segura, 104 S.Ct. at 3391.

As for the evidence uncovered for the first time during the warehouse search conducted pursuant to the warrant, *Segura* is on all fours and we necessarily affirm the denial of defendant's motion to suppress. Defendants argue that because the application for the warrant fails to mention the prior entry, the warrant was therefore tainted by the prior illegality. The district court properly rejected this argument for the reason that, absent fabrication of evidence, *see Franks* v. *Delaware*, 438 U.S. 154 (1978), the mere omission of irrelevant facts from an affidavit constitutes no reason to suppress the warrant. The omission did not "enhance the contents of the affidavit," *United States* v. *Stini*, 658 F.2d 593, 597 (8th Cir. 1981), nor deceive the magistrate into granting a warrant he would otherwise not have issued, *United States* v. *Lewis*, 621 F.2d 1382, 1389 (5th Cir. 1980), *cert. denied*, 450 U.S. 935 (1981). The fact of the illegal entry did not detract from the evidence related in the application of the overwhelming probable cause that existed antecedent to it.

A harder question is whether the district court should have suppressed the evidence—the marijuana bales—that was in plain view at the time of the illegal entry. As noted earlier, the Supreme Court in *Segura* was not obliged to address whether the evidence observed during the initial illegal search had been erroneously suppressed by the lower courts. As the dissent in *Segura* points out, however, the logic of the majority's reasoning applies equally to the evidence uncovered in the first search as to evidence uncovered in the second: "[t]he warrant provided an 'independent' justification for seizing all the evidence in the apartment—that in plain view just as much as the items that were concealed." *Segura*, 104 S.Ct. at 3400 (Stevens, J. dissenting). That argument is particularly strong in the present case where, unlike in *Segura*, agents entering the premises found them to be deserted, and hence the possibility seems nil that the evidence in plain view would or could have been removed or destroyed before the second search had

the illegality not occurred. Put another way, we can be absolutely certain that the warrantless entry in no way contributed in the slightest, either to the issuance of a warrant or to the discovery of the evidence during the lawful search that occurred pursuant to the warrant.

In a closely analogous situation, the Court has recently indicated that it will adhere to the independent justification analysis, ruling that where the location of a body was learned from the defendant through an interrogation in violation of *Miranda*, and the body was found pursuant to the defendant's information, the body need not be suppressed where the prosecution demonstrated that the body would inevitably have been discovered through a sweep search that was already underway. *See Nix* v. *Williams*, 104 S.Ct. 2501 (1984).

We realize that lower courts presented with the present issue have decided that evidence observed in an illegal search that was also observed and seized in a later search must be suppressed. *See United States* v. *Griffin*, 502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974); *see also Commonwealth* v. *Benoit*, 382 Mass. 210, 415 N.E.2d 818 (1981) (evidence found as direct product of illegal warrantless search not subject to argument that without search, evidence would inevitably have been discovered through a later search pursuant to a warrant). Arguably the Supreme Court in *Segura* also hinted at this result when it stated that "evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion." 104 S.Ct. at 3386. Since the chief, and perhaps sole, rationale for the exclusionary rule is to deter future violations of the fourth amendment, *see Leon*, 104 S.Ct. at 3412 (decided same day as *Segura*), arguably all evidence first spied through illegal procedures must be suppressed, no matter how "inevitable" its later, legal, discovery. But the reasoning in *Segura* and, certainly, that in *Nix*, lead us to conclude that the marijuana in plain view here upon entry should not be suppressed. This is as clear a case as can be imagined where the

discovery of the contraband in plain view was totally irrelevant to the later securing of a warrant and the successful search that ensued. As there was no causal link whatever between the illegal entry and the discovery of the challenged evidence, we find no error in the court's refusal to suppress.

C. *Use of the Blue and Red Notebooks at Trial*

During the second search of the warehouse at 345 D Street, agents discovered approximately 500 bales of marijuana. Each bale was marked with a piece of tape bearing two numbers. the numbers on the left of the tape identified the bales; the numbers on the right indicated approximately the weight of each bale.

Agents also seized a red and a blue notebook at the warehouse. The red notebook contains 28 pages with writing on them. Seven of the 28 have a name or apparent name at the top, one of which is "Omar;" six of the seven also have a single list of numbers below the name, which matches the numbers on bales seized during the various searches. The remaining 21 pages contain two columns of numbers. The numbers in the left column run sequentially from 1 to 505; the numbers on the right correspond approximately to the weight of the bales bearing the numbers in the left column. A torn piece of notebook paper matching the paper in the red notebook, with a matching pattern of numbers, was seized from the pocket of James Carter at the time of his arrest. The pages of the red notebook bear the fingerprints of James Carter, Michael Murray, and Joseph Murray.

The blue notebook contains one page of writing, on which the name "Omar" appears. That page also bears James Carter's fingerprints.

The trial court admitted the red notebook into evidence under Fed. R. Evid. 801(d)(2)(E), ruling that there was "a reasonable expectation that [it] might be able to find, at the end of the trial, that it was made by somebody who was engaged

in a conspiracy with one or more of the defendants." James Carter objects to the admission of the notebook into evidence. In doing so, Carter does not question the authenticity of the notebook under Fed. R. Evid. 901. We therefore assume that the red notebook is indeed what it seems to be: a record of the weights of bales of marijuana and a partial division of the bales among several persons.

Carter instead excepts to the red notebook's admissibility under Rule 801(d)(2)(E), which provides that "[a] statement is not hearsay if— . . . The statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Carter argues that the admissibility of the notebook depends on the fulfillment of a prior condition of fact, namely, the fact that it was kept by a co-conspirator, and that therefore, under Fed. R. Evid. 104(b), the notebook was admissible only if evidence was introduced "sufficient to support a finding" that that condition was fulfilled. Since the Government presented no evidence that the notebook was kept in a co-conspirator's handwriting, or any testimony by a witness or admission by a co-conspirator that it produced by one of the co-conspirators, Carter urges us to find that the condition precedent to the notebook's admissibility was not met.

But we think Carter's argument and Rule 801(d)(2)(E) are beside the point. In order for a co-conspirator's written statement to be hearsay, and thus to be inadmissible unless defined not to be hearsay under 801(d)(2)(E), the written statement must be a statement. *See* Fed. R. Evid. 801(c). Federal Rule of Evidence 801(a) defines a statement to be "(1) an oral or written *assertion* or (2) nonverbal conduct of a person, if it is intended by him as an assertion." The only assertions made in the notebook are that certain bales have certain weights, and that certain bales are assigned to certain persons. There is no issue as to the truth of these assertions, regardless of who wrote them down. Use of the red notebook as real evidence linking Carter and the two Murrays to the marijuana operation does not in-

volve the admission of any statements made in the notebook to prove the truth of the matters they assert, and therefore presents no hearsay problem; since the authenticity of the red notebook is unquestioned, the notebook is clearly admissible for this use.

The blue notebook was admitted at trial solely for the purpose of connecting Carter to the warehouse by means of the fingerprints found on it. An appropriate limiting instruction was given to the jury. The trial court denied Carter's request that the writing be covered over when the blue notebook was submitted to the jury, reasoning that to do so would invite its curiosity.

Carter argues that the district court's refusal to cover the writing constitutes error. He notes that the name "Omar" appeared on that page, as it did atop a page of bale numbers in the red notebook. We fail to see what prejudice could result from the exposure of the jury to the word "Omar," and we think the trial court's decision simply to give a limiting instruction well within the scope of the discretion accorded it on evidentiary questions. *See, e.g., United States* v. *Sorrentino*, 726 F.2d 876, 886 (1st Cir. 1984). *Affirmed.*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 83-102-S

UNITED STATES OF AMERICA,

PLAINTIFF,

v.

JAMES CARTER, ET AL.,

DEFENDANTS.

MEMORANDUM AND ORDER ON VARIOUS MOTIONS OF THE DEFENDANTS TO SUPPRESS AND TO DISMISS

December 23, 1983

SKINNER, D.J.

Defendants James Carter, Joseph Murray, Michael Murray, Arthur Barrett and John Rooney have been indicted in two counts for possession of marijuana in excess of one thousand pounds, with intent to distribute and distribution, and conspiracy to distribute, all in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(6), and 846. (Counts I and III).

Defendants James Carter, Joseph Murray, Michael Murray, Stephen King and Christopher Moscatiello have been indicted in two counts for possession of marijuana in excess of one thousand pounds, with intent to distribute and distribution, and conspiracy to possess marijuana in excess of one thousand pounds with intent to distribute, all in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(6), and 846. (Counts II and IV).

Defendants James Carter, Joseph Murray and Michael Murray have been indicted for possession of marijuana in excess of one thousand pounds, with intent to distribute and distribution, in violation of Title 21, United States Code, Sections 841(a)(1) and 941(b)(). (Count V).

The indictments arise out of arrests made on April 6, 1983. All of the defendants allegedly participated in a drug transaction on that date, and were apprehended in the course of that transaction.

All the defendants except Barrett, who has disappeared, have moved to suppress evidence seized in several searches, some with and some without warrant and also have moved to dismiss the indictment because of the illegality of evidence presented to the grand jury.

In summary, the evidence supports a finding that the following events occurred: Meetings and maneuvers by the defendants in the morning alerted surveillance agents of the Drug Enforcement Agency ("DEA") and the Federal Bureau of Investigation ("FBI") that a drug transaction was possibly in the offing. In the afternoon, some of the defendants, presumably Carter and Murray, loaded marijuana into a white Ford truck and a green Dodge camper at a warehouse at 345 D Street in South Boston. The loaded vehicles were driven from the warehouse and turned over to other defendants who were later arrested in or around the vehicles. In the afternoon and evening after the arrests, agents searched the following areas: (1) the white Ford truck (without warrant); (2) the green Dodge camper (with warrant): (3) the warehouse at 345 D Street (first without and later with warrant): and (4) a garage at 15 Sylvester Road, Dorchester, Massachusetts (with warrant). There were other searches conducted, but since they produced no significant material, there is no occasion to enter any orders with regard to them.

I. FINDINGS OF FACT.

A. *Information linking the defendants to the drug trade.*

The government had information from three informants linking defendants Rooney, Barrett, Joseph and Michael Murray to the drug trade. The first informant, Glen Castro, described from personal knowledge various conversations and transactions involving defendants Rooney and Barrett in early 1983, including (i) Rooney's delivery to Castro of a bale of marijuana; (ii) a conversation with Barrett where Barrett described the counting of $1 million in drug money; (iii) a con-

versation with Barrett where Barrett indicated he was in charge of a drug operation (at this meeting some $700,000 was in plain view); (iv) generally, the joint involvement of Rooney, Barrett and others in drug traffic. At the time of his interview, Castro was in prison for bank robbery in New Hampshire.

Another informant, one who had provided reliable information to the FBI in the past, had told an agent that Barrett was selling marijuana and cocaine out of his home in April, 1982. A third informant had described conversations between Barrett and Joseph Murray in March, 1983, about an incoming marijuana shipment, and had averred in a general way that Barrett was part of the "Joe Murray crew," a group known to the FBI as involved in various criminal activities. The third informant connected Barrett to a Ronald Barton, who had been arrested in connection with a purchase of marijuana from an undercover agent in February, 1983. The proposed plan involved the use of a rental truck as a means of transferring marijuana. Although Barton was not convicted, the informant said that he was in fact part of "Mr. Barrett's operation" for marijuana sales.

Sporadic surveillance beginning in July or August of 1982, confirmed the informant's information as to the regular association of Rooney and Barrett, and as to their occasional association with Barton and with the Murrays. Meetings among Rooney, Barrett, Barton and the Murrays occurred in the vicinity of the Pier Restaurant on Northern Avenue. Independent information received in March, 1983, indicated that there was a warehouse somewhere in South Boston which was used to store marijuana.

B. *Surveillance and arrest of defendants.*

On April 5, 1983, a surveillance was conducted by Special Agents of the FBI, which resulted in the following observations:

(a) 11:45 a.m.—John Rooney came out of 15 Sylvester Road, Dorchester, Massachusetts, entered a white Ford

truck (MA Reg. AD 19994), and proceeded on Gallivan Boulevard to the Southeast Expressway, arriving at the Pier Restaurant, Northern Avenue, Boston, at 11:52 a.m. and stopping briefly in the parking lot.

(b) 11:58 a.m.—Arthur Barrett, driving a white Mercury Brougham (MA Reg. 937599), left the Pier Restaurant parking lot and proceeded down Northern Avenue toward the Southeast Expressway. Barrett stopped at the side of the road and ducked down in the driver's seat.

(c) 11:59 a.m.—Rooney was observed driving the white Ford truck down Northern Avenue toward the Southeast Expressway.

(d) 12:07 p.m.—The white Ford truck was observed parked at 15 Sylvester Road, Dorchester.

(e) 12:11 p.m.—Arthur Barrett arrived at 15 Sylvester Road, Dorchester, driving his white Mercury Brougham. At 12:15, Barrett left his vehicle on the street, walked toward the garage at 15 Sylvester Road and then returned to his vehicle.

(f) 12:12 p.m.—A black Chevrolet Blazer (MA Reg. AE 2117) left the driveway at 15 Sylvester Road and Rooney backed the white Ford truck into the driveway and to the door of the garage.

(g) 12:17 p.m.—Rooney left the residence at 15 Sylvester Road, entered Barrett's vehicle and he and Barrett drove toward Boston on Gallivan Boulevard. (Tr. 2—19 to 2—24).

On April 6, 1983, another surveillance was conducted by Special Agents of the FBI and DEA, which resulted in the following observations:

(a) 11:00 a.m.—The white Ford truck (MA Reg. AD 19994) was observed parked next to the white Mercury Brougham (MA Reg. 937599) on Northern Avenue with Arthur Barrett and John Rooney sitting in the front seat of the Mercury: at 11:12 a.m., Barrett and Rooney drove

in the Mercury to the vicinity of the Pier Restaurant parking lot, turned around and returned to their former parking location. (Tr. 2A—5).

(b) 11:27 a.m.—A blue van (MA Reg. AB 66685) with ladders on the roof parked next to Barrett's vehicle and the driver of the blue van got out and spoke with Barrett. At that point, the white Ford truck backed out onto Northern Avenue and proceeded in the direction of the Southeast Expressway and was followed by surveillance agents. Suddenly, the white Ford truck made a U-turn and passed the surveillance agents who noted the driver to have black hair and be wearing sunglasses. Also, at this time, John Rooney was observed sitting in the passenger seat of Barrett's vehicle but Barrett was not seen. (Tr. 2A—5 to 2A—7).

(c) 11:50 a.m.—The white Ford truck, being driven by a man wearing a dark green shirt and sunglasses, later identified as Michael Murray, returned to the Northern Avenue area heading back to the original parking spot with an unidentified passenger. (Tr. 2A—8 to 2A—9; 3—9 to 3—10). The truck pulled alongside the white Mercury (Barrett's vehicle). (Tr. 2A—9; 3—11).

(d) 12:03 p.m.—The white Ford truck backed out onto Northern Avenue and drove toward the Southeast Expressway closely followed by the white Mercury. At this time, John Rooney was driving the white Ford truck and Arthur Barrett was driving the white Mercury. Surveillance agents followed the vehicles on the Southeast Expressway where Barrett continued to maintain a position directly behind the white Ford van, leaving no room for any vehicle to move in behind the truck. (Tr. 2A—9 to 2A—10; 3—12 to 3—14).

(e) 12:15 p.m.—The white Ford truck and the white Mercury arrived at 15 Sylvester Road. Rooney backed the truck into the driveway and up to the garage located at

the end of the driveway. (Tr. 3—15). Objects were placed on either side of the truck, obstructing any view into the garage. (Tr. 8—4 to 8—6).

(f) 12:41 p.m.—The white Ford truck driven by Rooney and the white Mercury driven by Barrett left 15 Sylvester Road and drove to the Southeast Expressway, and on to the area of Santoro's Sub Shop, Northern Avenue. During this drive, Barrett maintained a position about 100 feet behind the white Ford truck. (Tr. 3—16 to 3—17). Upon arrival, the truck parked at Santoro's and the white Mercury proceeded further up the road, made a U-turn and returned, parking next to the white truck. (Tr. 3—17 to 3—18).

(g) 12:50 p.m.—The blue van (MA Reg. AB 66685) was observed parked in a parking lot adjacent to a white cinderblock building at 345 D Street, South Boston, Massachusetts. (Tr. 2A—12 to 2A—13). Also, at this time, other surveillance agents obvserved Barrett and Rooney enter Santoro's Sub Shop for a short time. Rooney was then observed to go to a nearby pay phone and then join Barrett in the white Mercury. A short time later, Barrett walked to the same pay phone, appeared to make a call and returned to his car, while Rooney paced back and forth in front of Santoro's, apparently observing traffic driving on Northern Avenue. (Tr. 7—55 to 7—56).

(h) 1:10 p.m.—A 1982 GMC Jimmy (MA Reg. 129 KGD, registered to Joseph Murray, 51 Allston Street, Charlestown, Massachusetts) was observed parked next to the D Street door of the building at 345 D Street, South Boston. (Tr. 3—18 to 3—19).

(i) 1:15 p.m.—The blue van was observed driving on Northern Avenue toward the Southeast Expressway. (Tr. 7—55).

(j) 1:25 p.m.—The blue van returned to Northern Avenue from Atlantic Avenue, pulled into the parking lot of Anthony's Pier Four Restaurnat and parked beside a

red jeep Cherokee (MA Reg. 180 GVJ). (Tr. 7—57). Three men were observed meeting and apparently engaging in conversation. These men were later identified as Michael Murray, James Carter, and Stephen King. (Tr. 7—58). After a brief meeting, Carter and Murray returned to the blue van, King returned to the red Cherokee and they proceeded to Santoro's Sub Shop with the blue van in front and the red Cherokee directly behind. (Tr. 7—58).

(k) 1:30 p.m.—Murray, Carter, Barrett, and Rooney met at Santoro's and appeared to be in conversation. Murray then entered the white Ford truck and Carter was lost from sight going behind the white Ford truck. Murray, driving the white Ford truck and Carter driving a green Dodge camper (MA Reg. AD 71871) backed onto Northern Avenue and proceeded to the intersection of D Street and First Street, South Boston. (Tr. 7—59).

(l) 1:45 p.m.—The green Dodge camper was observed to park in the lot at the left of 345 D Street and the white Ford truck stopped on the First Street side of the 345 D Street building, next to two large black overhead doors. (Tr. 6—4 (Powers)). The right hand overhead door was raised by someone apparently inside the building, and the white Ford truck immediately backed into the building followed closely behind by the green Dodge camper. (Tr. 3—20; 6—4 (Powers)). The overhead door was immediately pulled down and closed. (Tr. 6—5 (Powers)).

(m) 2:05 p.m.—The same overhead door was opened and the green Dodge camper and white Ford truck immediately drove out of the building (345 D Street). (Tr. 3—22; 6—6 (Powers)). Surveillance agents following the two vehicles drove in front of the building and observed a white male pulling a chain to lower and close the overhead door. (Tr. 6—7 (Powers)). Also, at this time, the agents observed inside the building a second individual

and a tractor trailer rig with a large dark colored container on top. (Tr. 6—7 (Powers)).

(n) The green Dodge camper was followed from 345 D Street to the parking lot of the Pier Restaurant, Northern Avenue, where it parked facing Northern Avenue. The white Ford truck took the same route but was separated from the green camper by a traffic light (Tr. 6—8 (Powers)), and was observed at 2:10 p.m. to drive past the Pier Restaurnat parking lot, where the green Dodge camper followed directly behind the white truck. Both vehicles proceeded to Santoro's on Northern Avenue and parked on the street, one behind the other, to the right of Santoro's. (Tr. 6—9 (Powers)). Murray got out of the white Ford truck and walked toward Santoro's. At the same time, Rooney was observed walking from the area of Santoro's toward Murray. Both men converged, exchanged a set of keys from Murray to Rooney and kept walking without stopping and without any acknowledgment. (Tr. 6—9 (Powers)). Rooney walked directly to the white Ford truck, entered it, started the engine, and drove to the Southeast Expressway, southbound. (Tr. 6—9 (Powers)).

(o) Shortly after 2:10 p.m., the blue van was observed on Northern Avenue, where it came to a stop in the vicinity of a flower vendor at the roadside, (Tr. 3—24), at which time it was approached by Christopher Moscatiello. (Tr. 3—24, 4—18). Moscatiello then crossed Northern Avenue to the green Dodge camper, entered the camper and drove on Northern Avenue to Sleeper Street. (Tr. 6—11 to 6—12 (Powers)). At Sleeper Street, the green Dodge camper stopped without any traffic or traffic signals impeding its progress. After a short time, the red Jeep Cherokee driven by Stephen King, pulled up directly behind the green Dodge camper. (Tr. 6—11 (Powers)). The green Dodge camper immediately drove on to the

Massachusetts Turnpike by way of the Southeast Expressway. During the entire ride to the Massachusetts Turnpike, the red Cherokee followed directly behind the green Dodge camper, never allowing enough room for another vehicle to move between the two vehicles. Also during this trip, the green Dodge camper made several lane changes and was followed closely each time by the red Cherokee. (Tr. 6—14 (Powers)).

(p) At 2:25 p.m., the green Dodge camper and the red Cherokee were stopped by surveillance agents while in a toll line at the Allston Toll Plaza. Christopher Moscatiello was removed from the green Dodge camper and Stephen King from the red Cherokee and each was placed under arrest. (Tr. 6—15 (Powers)). Special Agent Powers (DEA) entered the green Dodge camper to move it out of the toll plaza line and off to the roadside. (Tr. 6—15 (Powers)). Agent Powers then looked to the rear of the cab and saw, through an angular opening in the curtains to the rear window of the camper area of the vehicle, burlap bales, which he knew to be a common packing for marijuana. (Tr. 6—16 (Powers)). These facts were broadcast to all other agents. (Tr. 6—27 (Powers)).

(q) After the two vehicles were moved to the side of the road, Moscatiello and King were placed under arrest, informed of their rights and transported to the DEA Boston office. (Tr. 6—36 (Powers)). The two vehicles were seized and removed to the J.F. Kennedy Federal Building, Boston.

(r) At 2:30 p.m., John Rooney, who had been followed from the Northern Avenue area, arrived at 15 Sylvester Road, Dorchester, and backed the white Ford truck into the driveway. As Rooney got out of the vehicle he was placed under arrest. One of the agents on the scene indicated he observed an odor of marijuana coming from the truck. Another agent removed a set of keys from Rooney's

hands at the time of his arrest and Special Agent Boeri (DEA) used one of the keys to unlock the rear door of the truck. Upon opening the door, the agent observed approximately 60 bales of marijuana. (Tr. 8—15 to 8—17). The garage was then secured by the stationing of agents outside it, (Tr. 8—21) and Agent Boeri advised the other agents involved in the surveillance of the facts he had learned by radio. (Tr. 8—20). At this time, the location of Arthur Barrett was unknown.

(s) At approximately 2:20 p.m., other agents drove into the parking lot of the Pier Restaurant and observed two males seated in separate vehicles adjacent to one another. (Tr. 2A—20, 4—33). The man seated in a green pickup truck, later identified as Craig Billingham, ducked down in the driver's seat. The agents approached and observed the man whom they identified as Michael Upton in a gray Mercury Zephyr. (Tr. 2A—20, 4—33). At this time, the blue van drove slowly by the Pier Restaurant parking lot. (Tr. 2A—21). The agents stopped the blue van and subsequently identified James Carter and Michael Murray as the passenger and driver of the van. (Tr. 2A—22, 3—25). Carter and Murray were placed under arrest when the agents received the information by radio from agents at Sylvester Road, Dorchester, and at the Allston Toll Plaza, Massachusetts Turnpike that the green camper, red Cherokee and white truck had been stopped and the occupants arrested. (Tr. 2A—23, 4—36 to 4—37, 6—11 (Garibotto)).

(t) At approximately 2:30 p.m., agents had moved to the area of the white cinderblock building at 345 D Street, South Boston, where they observed a short white male, approximately 45 years old, with swept black hair, gloves in his rear pants pocket and smoking a pipe. (Tr. 3—28). This man was pacing back and forth on D Street in front of the white cinderblock building, looking at traffic as it passed. (Tr. 3—29). The agents drove around

the block and the man was longer seen outside the building. (Tr. 3—30, 6—11 to 6—12 (Garibotto)).

(u) At approximately 2:40 p.m., other agents arrived on the scene and attempts were made to determine if anyone was in the building at 345 D Street, by knocking and then banging on the entry door and on the large, overhead doors. Agents went around the building in an attempt to see the interior of the building through a window but there was no exterior position affording a view of the general interior of the building. (Tr. 3—31). At all stages of this process, the agents were regularly stating their identities as federal law enforcement agents. (Tr. 3—31). Finally, in an effort to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence, the agents made a forced entry of the building. (Tr. 3—32). After a brief view of the premises, they determined that no one was inside (Tr. 3—33), detected both a strong odor of marijuana and observed many burlap wrapped bales which they believed to contain marijuana. The building was then secured and guarded from the outside (Tr. 3—34, 6—13 to 6—17 (Garibotto)).

(v) At approximately 3:00 p.m., Arthur Barrett arrived at 15 Sylvester Road, Dorchester, and was immediately placed under arrest. (Tr. 8—21). His white Mercury was seized and he and Rooney were transported to DEA Boston office.

The FBI and DEA agents involved in the case testified that the vehicle exchanges are a common mode of transferring large purchases of marijuana and that the pattern of vehicular movement described above was indicative to them, as experienced law enforcement officers, of an imminent illicit sale of a large quantity of marijuana. The decision to arrest the defendants and to conduct the above searches and seizure was made jointly by supervising agents of the FBI and DEA.

The times stated are very approximate, and the defendants strongly contest the times stated in items (s) and (u). They offered evidence that these events occurred earlier than stated, and that the seizure of the white Ford truck, green Dodge camper and the red Cherokee came after the warrantless entry by the agents ino the D Street warehouse and the observation by the agents of quantities of marijuana therein. The defendants' witnesses attempted to fix time by estimating time elapsed between various events. This form of estimating time is notoriously inexact. It is common experience that one's perception of the lapse of time is subject to a number of subjective variables. The agents' concept of time is probably not a great deal better in terms of minutes. I do accept their account of the sequence of events as being more probable than otherwise. *United States* v. *Matlock*, 415 U.S. 164, 177 (1974); *United States* v. *Ochs*, 461 F.Supp. 1, 7 (S.D. N.Y.), *aff'd*, 636 F.2d 1205, *cert. den.*, 451 U.S. 1016 (1981).

C. *Searches and seizures.*

The agents who arrested Rooney at 15 Sylvester Road also searched the white Ford truck, found bales of marijuana in the truck and seized both the truck and the bales of marijuana. The agents who arrested Moscatiello seized the green Dodge camper. Thereafter the agents secured search warrants for the green camper, the D Street warehouse and the garage at 15 Sylvester Road. The resulting search revealed a substantial number of bales of marijuana in the back of the camper, in the warehouse and in the garage.

In their application to the magistrate for the search warrant for the D Street warehouse, the agents did not reveal the fact that they had previously made the forced entry into the warehouse.

II. Rulings of law.

Critical to the resolution of the motions to suppress is a determination of whether the pattern of vehicular movements

on April 5, 1983 and again on April 6, 1983 (paragraphs (a) to (o) above) constituted probable cause for the subsequent arrests and seizures, and by extension for the issuance of search warrants. This pattern must be considered in the light of the agents' information that Barrett, Rooney and the Murrays were engaged in the drug traffic.

In *Illinois* v. *Gates*, 103 S. Ct. 2317 (1983), the Supreme Court discussed the standard for determining the existence of probable cause:

> [W]e deal with...the factual and practical considerations of everday life on which reasonable and prudent men, not legal technicians, act....The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Evidence which would have little significance to a layman may provide a meaningful pattern to experienced law enforcement officials. *United States* v. *Cortez*, 449 U.S. 411, 418 (1981): *United States* v. *Manchester*, ____F.2d____ (1st Cir. July 7, 1983) (No. 82-1371 slip opinion).

If there was probable cause to believe that the pattern of the defendants' activity revealed an ongoing drug transaction, the search of the white panel truck was reasonable. *United States* v. *Ross*, 456 U.S. 798 (1982). Even though the truck had temporarily come to rest, lkthe exigency was the same as it is in cases where a vehicle has been stopped on the highway.

If the pattern of activity, taken together with the informant's information, constituted probable cause for the arrest of the defendants, it is clear that the recitation of these events was a

sufficient basis fot the issuance of the various search warrants. The one further question concerning the search warrants is whether the warrant for the D Street warehouse was vitiated by the prior warrantless entry of the warehouse. If the entry of the warehouse had been illegal, any recitation of the observations made by the agents in the application for a search warrant would have rendered the search warrant invalid as fruit of an illegal search. That was not the case, however, and there was no such taint.

The defendants assert, however, that the *failure* to reveal the prior entry itself tainted the issuance of the search warrant. Deliberate misstatements by agents in the application for a search warrant vitiate the warrant. *Franks* v. *Delaware*, 438 U.S. 154 (1978); *United States* v. *Belculfine*, 508 F.2d 58 (1974). However, the courts have uniformly held that an *omission* of facts from an affidavit, without more, does not constitute a false statement made with intent to deceive within the meaning of *Franks* v. *Delaware*. *See United States* v. *Stini*, 658 F.2d 593, 597 (8th Cir. 1981); *United States* v. *Lewis*, 621 F.2d 1382, 1389 (5th Cir.) *cert. denied* 450 U.S. 935 (1981); *United States* v. *Botero*, 589 F.2d 430, 433 (9th Cir.) *cert. denied* 441 U.S. 944 (1979). The omission of information regarding the earlier entry into the warehouse from the warrant affidavit was not a false statement, and it did nothing to "enhance the contents of the affidavit", *United States* v. *Stini*, 658 F.2d at 597, or to deceive the magistrate into granting the warrant. *United States* v. *Lewis*, 621 F.2d 1382 (5th Cir. 198) is directly on point. There, DEA agents had made a warrantless search of a laboratory, and omitted mention of it in the warrant affidavit. The defendants argued that the agent's failure to inform the magistrate of the prior search was an intentional and material misrepresentation regarding invalidation of the warrant. The magistrate disagreed, and the Court of Appeals affirmed.

The defendants also suggest that because the affidavit misidentifies the source of the information that there was a marijuana warehouse in South Boston, the warrants are invalid. Although the agents were confused about the source of the tip, they had, in fact, received the tip. The error in attribution was insignificant.

Nighttime searches for controlled substances are authorized by statute, 21 U.S.C. §879. *Gooding* v. *United States*, 416 U.S. 430, 458 (1974).

Conclusions.

The critical question in this case is whether the pattern of activity observed by FBI and DEA agents on April 5 and 6, 1983 furnished probable cause for the arrest of the defendants, the seizure and search of the vehicles and the eventual searches under warrants. Reliance on the expertise of the law enforcement officers introduces a subjective element into the assessment of probable cause which on a sliding scale degenerates to mere hunch or guesswork. What is more, there is no opportunity to test the officers' track record, as one can test, for instance, the performance of a drug-sniffing police dog. In all the cases which come to the attention of the courts, the police have been correct. We do not know how many warrantless searches have been fruitlessly inflicted on the innocent.

In this case, the pattern of activity by itself, even though consistent with the mode of operation of drug dealers, would not of itself justify the officers' actions. Similarly, the information gathered from informers concerning the defendants' prior drug related activities, standing alone, were not sufficiently specific as to present activity to justify arrest, seizure of search. The informers' information, however, illuminates the unusual but otherwise inexplicable activity of the defendants of April 5 and 6. On balance, I am persuaded that the officers were justified in arresting the defendants searching the white Ford truck and seizing the green Dodge camper. One of the significant

facts was the collective nature of the decision of arrest, seizure and search. I find it was the collective and considered judgment of experienced supervisors of both the FBI and the DEA that there was a drug transaction in the process of consummation. The Fourth Amendment does not impose on law enforcement a foolish paralysis.

It follows that the same facts, with the addition of the results of the search of the white Ford truck and the observation of marijuana in the green Dodge camper, furnished probable cause for the issuance of search warrants. The affidavit in support of the various applications did contain an averment that the agent who stopped the green Dodge camper smelled marijuana coming from the cab of the vehicle. As a result of taking a view of the camper I concluded that it was improbable that any odor smelled in the cab came from the camper section of the truck where the marijuana was found since the camper was a separate fully enclosed unit. I have not found and do not find, however, that the agent was making a deliberate material misstatement sufficient to invalidate the search warrant in accordance with *United States* v. *Belculfine*, 508 F.2d 58 (1st Cir. 1974). In *Belculfine*, the agents reported observation was physically impossible. In this case, it was not impossible that the odor of marijuana came from some source within the cab.[1] That particular information was not crucial, however, since the agent also observed a bale which looked like a bale of marijuana.

Accordingly, I find and rule that none of the above arrests, searches or seizures violated the Fourth Amendment. There were searches at other locations but since no evidence was found or seized at those locations, there is no point in discussing them in this memorandum.

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[1] At the view I was shown a purported bale of marijuana which had no distinguishable odor at all. A subsequent view in another case had led me to believe that fresh or damp marijuana does have a distinctive, pungent and clinging odor.

Supplementary Findings and Ruling on Standing.

The foregoing makes moot the issue of standing to complain of the various searches and seizures. To complete the record I make the following findings and ruling:

1. Rooney had a sufficiently authorized possessory interest in the white Ford truck to give him standing to complain of the search thereof. He has no standing with respect to any other search and seizure. No other defendant has standing with reference thereto.
2. Moscatiello had a sufficiently authorized possessory interest in the green Dodge camper to have standing to complain of the search thereof. He has no standing with respect to any other search. No other defendant has standing with reference thereto.
3. None of the defendants have standing to challenge the search of the warehouse, which was owned by a corporation in the absence of any evidence that any portion of the warehouse was set aside for the personal use of any defendant as corporate officer, employee or financial backer.
4. No defendant has standing to complain of the search of the garage at 15 Sylvester Road, since the owner of the house had obvious access to it, and there was accordingly no legitimate expectation of privacy.

Order.

The various motions to suppress are DENIED. The motions to dismiss because of the presentation of illegal evidence to the grand jury are DENIED for the same reasons.

s/ WALTER JAY SKINNER
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 83-102-S

UNITED STATES OF AMERICA,

PLAINTIFF,

v.

STEVEN D. KING, ET AL.,

DEFENDANTS.

MEMORANDUM AND ORDER RE SPEEDY TRIAL
February 10, 1984

SKINNER, D.J.

On the day of trial the defendant King moved to dismiss the indictment on the grounds of violation of the Speedy Trial Act. The other defendants orally joined in the motion. After a preliminary review of the motion and of the docket, I concluded that it was likely that there was excludable time which the defendant had not considered and ordered the parties to proceed with trial. The defendant Joseph Murray was acquitted by order of the court and the defendant King was acquitted by the jury. The defendants Michael Murray and James Carter were each found guilty of one count of conspiracy. Defendants Rooney and Moscatiello offered pleas of guilty on the first day of trial.

The statutory period commenced with the return of the indictment on April 20, 1983. Trial commenced on January 23, 1984. This is a period of 278 days, not 288 as claimed by the defendant. The permitted period is 70 days plus excludable time under 18 U.S.C. §3161. The defendant concedes 195 days of excludable time. An additional 8 days is excludable because of the pendency of a government motion for permission to use charts filed on January 10, 1984, bringing the total to 203. There is thus a shortfall of 5 days if no additional time is excludable.

Much of the delay relates to the defendants' motions to suppress evidence. The testimony concerning various arrests, searches and

seizures was complex and confusing. Briefing was completed by October 17, 1983. Under §3161(h)(1)(J) there were thirty days of excludable time during which the motion was held under advisement. The motion was not decided, however, until December 23. The period November 16 to December 23 was not excludable by reason of the pendency of the motions to suppress.

The defendants had also filed a large number of other motions, for severance, for orders *in limine*, election of counts, and for controlling the sequence of the government's presentation of evidence. These motions were pending during consideration of the motions to suppress evidence.

No hearing was held before me on these matters. I did not consider them or take them under advisement until after I had decided the motion to suppress on December 23, 1983. They are therefore not subject to the thirty day provision of §3161(h)(1)(J) but to the reasonable time requirement implicit in §3161(h)(1)(F). *United States* v. *Mitchell*, ____F.2d____(1st Cir. December 29, 1983) (Slip opinion No. 82-1930).

These motions primarily concerned the ordering of the trial. The summary judgment motion, however, was dispositive. If it had been allowed, the government would not have been able to go forward with trial. I conclude that it was reasonable to hold these motions until I had decided the motion to suppress.

Even though the motion to suppress was under advisement for longer than the permitted *excludable* time of thirty days, it was not held a unreasonable time in my view given the complexity of the testimony and the difficulty of determining the extent to which subjective judgment, albeit expert, should support a finding of probable cause. While the Speedy Trial Act is intended to discourage obsessional delay, it should not be interpreted to discourage thoughtful consideration *by* district judges of difficult questions.

Excludable time, therefore, runs from the time of the filing of these motions until December 23, 1983. This represents 35 additional days of excludable time from November 17 to December 23, 1983. There is thus a total of 238 days of excludable time out of 278 days of elapsed time between indictment and trial. The difference of 40 days is within the permitted 70 day limit.

Accordingly, the motion to dismiss is DENIED.

s/ WALTER JAY SKINNER
United States District Judge

United States Court of Appeals
For the First Circuit

No. 84-1262.

UNITED STATES,

APPELLEE,

v.

JAMES D. CARTER,

DEFENDANT, APPELLANT.

JUDGMENT

ENTERED: AUGUST 26, 1985

This cause came on to be heard on appeal from the United States District Court for the District of MASSACHUSETTS, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgment of the District Court is affirmed.

By the Court:

s/ FRANCIS P. SCIGLIANO

Clerk

[CC: MESSRS. STEIN AND CROSSEN]

United States Court of Appeals
For the First Circuit

No. 84-1192

UNITED STATES OF AMERICA,

APPELLEE,

v.

CHRISTOPHER MOSCATIELLO,

DEFENDANT, APPELLANT.

No. 84-1193

UNITED STATES OF AMERICA,

APPELLEE,

v.

JOHN M. ROONEY,

DEFENDANT, APPELLANT.

No. 84-1262

UNITED STATES OF AMERICA,

APPELLEE,

v.

JAMES D. CARTER,

DEFENDANT, APPELLANT.

No. 84-1263

UNITED STATES OF AMERICA,

APPELLEE,

v.

MICHAEL F. MURRAY,

DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[HON. WALTER JAY SKINNER, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
BREYER, *Circuit Judge*,
and WEIGEL,* *Senior District Judge*.

ON PETITION FOR REHEARING
Entered October 31, 1985

For purposes of clarification, we amend our opinion issued August 26, 1985 as follows:

On page 11, first full paragraph, line 1, after "that", insert the words "at least part of".

On page 11, first full paragraph, line 3, after "§3161(h)(1)(F)," add: ", in respect to those particular motions."

On page 11, first full paragraph, last line, add: "This is not to say, of course, that more than 30 days can be *excluded* under section 3161(h)(1)(J) for deciding the suppression motions. Rather, we simply hold that the additional five days which must be excluded to avoid a violation of the Act are excludable under section 3161(h)(1)(F) as constituting time reasonably attributable to the remaining non-suppression motions."

On page 12, first paragraph, line 2, "amounted to 45 days" should be changed to read "did not exceed 70 days."

The petition for rehearing is in all other respects denied.

By the Court,
s/ FRANCIS P. SCIGLIANO
Clerk.

[CC: MESSRS: O'CONNELL, WEINBERG, STEIN, RANDOLPH AND CROSSEN]

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* Of the Northern District of California, sitting by designation.

United States District Court
District of Massachusetts

CRIMINAL NO. 83-102-S

UNITED STATES OF AMERICA

v.

JAMES DAVID CARTER
MICHAEL FRANCIS MURRAY
JOSEPH MURRAY
JOHN MICHAEL ROONEY
ARTHUR MICHAEL BARRETT
STEVEN DAVID KING
CHRISTOPHER B. MOSCATIELLO

Violations:

21 USC 841(a)(1)—Possession with Intent to Distribute
21 USC 841(b)(6)—Possession with Intent to Distribute in Excess of One Thousand Pounds
21 USC 846—Conspiracy to Possess with Intent to Distribute
18 USC 2—Aiding and Abetting

SUPERSEDING
INDICTMENT

COUNT ONE: (21 USC 846—Conspiracy to Possess with Intent to Distribute Marijuana in Excess of One Thousand Pounds)

The Grand Jury charges that:

From on or about April 5, 1983, up to and including April 6, 1983, at Boston and elsewhere in the District of Massachusetts,

JAMES DAVID CARTER,
MICHAEL FRANCIS MURRAY,
JOSEPH MURRAY,
JOHN MICHAEL ROONEY,
AND
ARTHUR MICHAEL BARRETT

did knowingly, willfully and intentionally combine, conspire, confederate and agree with each other to commit an offense against the United States, to wit: knowingly and intentionally to possess with intent to distribute and to distribute a quantity of marijuana, a Schedule I controlled substance in excess of 1,000 pounds, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(6); all in violation of Title 21, United States Code, Section 846.

COUNT TWO: (21 USC 846—Conspiracy to Possess with Intent to Distribute Marijuana in Excess of One Thousand Pounds)

The Grand Jury further charges that:

On or about April 6, 1983, at Boston and elsewhere in the District of Massachusetts,

JAMES DAVID CARTER,
MICHAEL FRANCIS MURRAY,
JOSEPH MURRAY,
STEVEN DAVID KING,
AND
CHRISTOPHER B. MOSCATIELLO

did knowingly, willfully and intentionally combine, conspire, confederate and agree with each other to commit an offense against the United States, to wit: knowingly and intentionally to possess with intent to distribute and to distribute a quantity of marijuana, a Schedule I controlled substance in excess of one thousand pounds, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(6); all in violation of Title 21, United States Code, Section 846.

COUNT THREE: (21 USC 841(a)(1) and 841(b)(6)—Possession with Intent to Distribute Marijuana in Excess of One Thousand Pounds and 18 USC 2—Aiding and Abetting)

The Grand Jury further charges that:

From on or about April 5, 1983, up to and including April 6, 1983, at Boston and elsewhere in the District of Massachusetts,

JAMES DAVID CARTER,
MICHAEL FRANCIS MURRAY,
JOSEPH MURRAY,
JOHN MICHAEL ROONEY,
AND
ARTHUR MICHAEL BARRETT

did knowingly and intentionally possess with intent to distribute a quantity of marijuana, a Schedule I controlled substance, in excess of one thousand pounds, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(6), and Title 18, United States Code, Section 2.

COUNT FOUR: (21 USC 841(a)(1) and 841(b)(6)—Possession with Intent to Distribute Marijuana in Excess of One Thousand Pounds and 18 USC 2—Aiding and Abetting)

The Grand Jury further charges that:

On or about April 6, 1983, at Boston and elsewhere in the District of Massachusetts,

JAMES DAVID CARTER,
MICHAEL FRANCIS MURRAY,
JOSEPH MURRAY,
STEVEN DAVID KING,
AND
CHRISTOPHER B. MOSCATIELLO

did knowingly and intentionally possess with intent to distribute a quantity of marijuana, a Schedule I controlled substance, in excess of one thousand pounds, in violation of Title 21,

United States Code, Sections 841(a)(1) and 841(b)(6), and Title 18, United States Code, Section 2.

COUNT FIVE: (21 USC 841(a)(1) and 841(b)(6)—Possession with Intent to Distribute Marijuana in Excess of One Thousand Pounds and 18 USC 2—Aiding and Abetting)

The Grand Jury further charges that:

On or about April 6, 1983, at Boston and elsewhere in the District of Massachusetts,

JAMES DAVID CARTER,
MICHAEL FRANCIS MURRAY,
AND
JOSEPH MURRAY

did knowingly and intentionally possess with intent to distribute a quantity of marijuana, a Schedule I controlled substance, in excess of one thousand pounds, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(6), and Title 18, United States Code, Section 2.

DOCKET ENTRIES

[CAPTION OMITTED IN PRINTING]

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		(Dkt'd 10/06/83).
10/07/83	252	Order of excludable delay began on 09/29/83 and ended on 09/30/83 (pretrail motions—2 days) (JUDGE SKINNER) (Dkt'd 10/11/83).
10/11/83	253	Filed memorandum in support of motion and to suppress evidence (MOT #'s 31, 32, 33, 34, 35) (Dkt'd 10/12/83).
10/18/83	256	Motion by government filed (MOT #156) (for leave to file a response to the memorandum in support of motion to suppress) (Dkt'd 10/19/83).
	257	—(MOT #'s 31, 32, 33, 34, 35) (Government's response to defendants' memorandum in support of motion to suppress) (Dkt'd 10/19/83).
		Mark the beginning of a potential excludable period of type X-E starting on 05/09/83 ((In re MOTION TO SEVER on 5/9/83)) (Dkt'd 10/19/83).
		Excludable delay while defendant motion under advisement, began on 09/17/83 and ended on 10/16/83 (Dkt'd 10/25/83).
10/19/83		Motion by government granted (MOT #156) (JUDGE SKINNER) (Dkt'd 01/24/84).
		Excludable delay due to hearings on Pretrial Motions began on 10/18/83 and ended on 10/19/83 (Dkt'd 01/24/84).
10/27/83	259	Order of excludable delay began on 09/17/83 and ended on 10/16/83 (motions under advisement—30days) (JUDGE SKINNER) (Dkt'd 10/28/83).

11/22/83		Excludable delay due to hearings on Pretrail Motions began on 05/09/83 and ended on 10/18/83 (JUDGE SKINNER) (Dkt'd 12/05/83). Excludable delay while defendant motion under advisement, began on 10/19/83 and ended on 11/17/83 (JUDGE SKINNER) (Dkt'd 12/05/83).
12/06/83	262	Order of excludable delay began on 05/09/83 and ended on 10/18/83 (Pretrail motions for (163) days.) (JUDGE SKINNER) (Dkt'd 12/07/83).
	263	Order of excludable delay began on 10/19/83 and ended on 11/17/83 (Proceedings under advisement for (30) days.) (JUDGE SKINNER) (Dkt'd 12/07/83).
12/21/83		Motion for severance/separate trial denied (MOT #38) (JUDGE SKINNER) (Dkt'd 01/24/84).
		Motion to dismiss denied (MOT #40) (JUDGE SKINNER) (Dkt'd 01/24/84).

09/27/83).

10/03/83 242 Filed memorandum in opposition to motion to suppress evidence (MOT #54) (and consolidated request for findings (fact) (Dkt'd 10/04/83).

10/04/83 243 Filed memorandum in support of motion to suppress evidence (MOT #54) (Dkt'd 10/04/83).

Excludable delay due to hearings on Pretrial Motions began on 05/09/83 and ended on 09/17/83 (Dkt'd 10/12/83).

10/18/83 Excludable delay while defendant motion under advisement, began on 09/17/83 and ended on 10/16/83 (Dkt'd 10/25/83).

10/27/83 259 Order of excludable delay began on 09/17/83 and ended on 10/16/83 (motions under advisement—30 days) (JUDGE SKINNER) (Dkt'd 10/28/83).

Excludable delay due to hearings on Pretrial Motions began on 05/09/83 and ended on 10/04/83 (JUDGE SKINNER) (Dkt'd 12/05/83).

Excludable delay while defendant motion under advisement, began on 10/05/83 and ended on 11/03/83 (JUDGE SKINNER) (Dkt'd 12/05/83).

12/06/83 266 Order of excludable delay began on 05/09/83 and ended on (Pretrial motions for (149) days.) (JUDGE SKINNER) (Dkt'd 12/07/83).

267 Order of excludable delay began on 10/05/83 and ended on 11/03/83 (Proceedings under advisement for (30) days.) (JUDGE SKINNER) (Dkt'd 12/07/83).

12/21/83		Motion for severance/separate trial denied (MOT #51) (JUDGE SKINNER) (Dkt'd 01/24/84).
		Appearance of attorney DIMENTO, FRANCIS (Dkt'd 01/24/84).
12/23/83	270	Order filed (memorandum and order on various motions to suppress and to dismiss) (JUDGE SKINNER) (Dkt'd 12/27/83).
	270	Motion to suppress evidence denied (MOT #54) (JUDGE SKINNER) (Dkt'd 12/27/83).
	271	Status hearing set for 01/05/84 @ 2:00 PM (JUDGE SKINNER) (Dkt'd 12/27/83).
01/05/84	273	Minute sheet filed (JUDGE SKINNER) (Dkt'd 01/06/84).
	273	Pre-trial conference held (Counts S2, S4) (JUDGE SKINNER) (Dkt'd 01/06/84).
	273	Trial date set for 01/23/84 @ 9:00 AM (Counts S2, S4) (JUDGE SKINNER) (Dkt'd 01/06/84).
01/10/84	274	Motion by government filed (MOT #159) (To permit use of

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	240	Filed transcript of proceedings for 09/02/83 (testimony of Detective THOMAS J. MCCABE) (JUDGE SKINNER) (Dkt'd 09/27/83).
10/03/83	242	Filed memorandum in opposition to motion to suppress evidence (MOT #119) (and consolidated request for findings of fact) (Dkt'd 10/04/83).
10/04/83	245	Filed memorandum in support of motion to suppress evidence (MOT #119) (Dkt'd 10/05/83).
10/05/83	249	Order of excludable delay began on 05/01/83 and ended on 09/17/83 (131 days for pretrial motions) (JUDGE SKINNER) (Dkt'd 10/06/83).
	250	Order of excludable delay began on 06/17/83 and ended on 09/17/83 (93 days for pretrial motions) (JUDGE SKINNER) (Dkt'd 10/06/83).
10/18/83		Mark the beginnings of a potential excludable period of (illegible) X-E starting on 05/10/83 ((In re MOTION TO SEVER on 5/10/83)) (Dkt'd 10/19/83).
		Excludable delay while defendant motion under advisement, began on 09/17/83 and ended on 10/16/83 (Dkt'd 10/25/83).
10/27/83	259	Order of excludable delay began on 09/17/83 and ended on 10/16/83 (motions under advisement—30 days) (JUDGE SKINNER) (Dkt'd 10/28/83).
		Excludabe delay due to hearings on Pretrial Motions began on 05/09/83 and ended on 10/04/83 (JUDGE SKINNER) (Dkt'd 12/05/83).
		Excludable delay while defendant motion under advisement, began on 10/05/83 and ended on 11/03/83 (JUDGE SKINNER) (Dkt'd 12/05/83).
12/06/83	266	Order of excludable delay began on 05/09/83 and ended on 10/04/83 (Pretrail motions for

(149) days.) (JUDGE SKINNER) (Dkt'd 12/07/83).

267 Order of excludable delay began on 10/05/83 and ended on 11/03/83 (Proceedings under advisement for (30) days.) (JUDGE SKINNER) (Dkt'd 12/07/83).

12/21/83 136 —(MOT #93) (Re defendant's motion in limine: "The United State: Attorney is ordered to inform the court before referring to any other crimes of (illegible) misconduct, and is further ordered to advise all government witnesses of this order.") (JUDGE SKINNER) (Dkt'd 01/25/84).

133 Motion denied (MOT #91) (JUDGE SKINNER) (Dkt'd 01/25/84).

100 Motion for severance separate trial denied (MOT #57) (JUDGE SKINNER) (Dkt'd 01/25/84).

275 Motion for severance/separate trial filed (MOT #160) (Counts S1, S3) (Dkt'd 01/25/84).

275 Motion for severance/separate trial denied (MOT #160) (JUDGE SKINNER) (Dkt'd 01/25/84).

101 Motion to dismiss denied (MOT #58) (JUDGE SKINNER) (Dkt'd 01/25/84).

171 Motion denied (MOT #118) (JUDGE SKINNER) (Dkt'd 01/25/84).

276 Motion to dismiss filed (MOT #161) (Dkt'd 01/25/84).

276 Motion to dismiss denied (MOT #161) (JUDGE SKINNER) (Dkt'd 01/25/84).

Excludable delay due to hearings on Pretrial Motions began on 06/02/83 and ended on 12/21/83 (Dkt'd 01/25/84).

Excludable delay due to hearings on Pretrail Motions began on 05/10/83 and ended on 12/21/83 (Dkt'd 01/25/84).

12/23/83	270	Order filed (memorandum and order on various motions to suppress and to dismiss) (JUDGE SKINNER) (Dkt'd 12/27/83).
	270	Motion to suppress evidence denied (MOT #119) (JUDGE SKINNER) (Dkt'd 12/27/83).
	271	Status hearing set for 01/05/84 @ 2:00 PM (JUDGE SKINNER) (Dkt'd 12/27/83).
01/05/84	273	Minute sheet filed (JUDGE SKINNER) (Dkt'd 01/06/84).
	273	Pre-trial conference held (Counts S1, S2) (JUDGE SKINNER) (Dkt'd 01/06/84).
	273	Trial date set for 01/23/84 @ 9:00 AM (Counts S1, S3) (JUDGE SKINNER) (Dkt'd 01/06/84).
01/10/84	274	Motion by government filed (MOT #159) (To permit use of charts during opening and closing arguments.) (Dkt'd 01/10/84).
01/17/84		Motion by government granted (MOT #159) (JUDGE SKINNER) (Dkt'd 01/18/84). Excludable delay due to hearings on Pre-trial Motions began on 01/10/84 and ended on 01/17/84 (Dkt'd 01/18/84).
01/23/84	279	Minute sheet filed (JUDGE SKINNER) (Dkt'd 01/25/84).
	279	Hearings for possible change of plea held (Count S3) (JUDGE SKINNER) (Dkt'd 01/25/84).
	279	Plea of guilty tendered (Count S3) (Dkt'd 01/25/84).
	279	Guilty plea accepted by the Court (Count S3) (JUDGE SKINNER) (Dkt'd 01/25/84).
	279	Disposition set for 02/21/84 @ 2:00 PM (Count S3) (JUDGE SKINNER) (Dkt'd 01/25/84).
	280	Reservation of appellate issue pursuant to Federal Rule Criminal Procedure 11(a)(2) filed and approved (Dkt'd 01/25/84).

another motion is pending which may be dispositive of the trial. C.A. 28, page 3 of Speedy Trial Memo. This is not the test set forth in *Mitchell*. To the contrary, allowing a district court to freeze consideration of all other motions until it addresses a potentially "dispositive" motion would create a "'loophole which could undermine the whole Act.'" *Mitchell, supra* 723 F.2d at 1046. It creates the very danger that both Congress and *Mitchell* seek to prevent: "...we recognize, as did the Congress, that an open-ended time period for hearing pretrial motions could defeat the intent and purpose of the Act." *Mitchell, supra*, 723 F.2d at 1047.

On this basis alone, that the seven and a half months from May 9 to December 21, 1983 were not reasonably necessary to decide these other motions, the additional 35 days excluded from the Speedy Trial clock should be restored; the trial was thus held 75 elapsed days after indictment; and the Act was violated.

However, even if this Court should hold that Mitchell is satisfied by waiting to determine another pre-trial motion, if that other motion's disposition is necessary to determine the motions under review, such was not the case here. The trial judge recited in his Speedy Trial Memo that he "did not consider them or take them under advisement until after...[he] had decided the motion to suppress on December 23, 1983." C.A. 27. But the record reflects that these other motions were decided on December 21, 1983, two days before the Motion to Suppress was decided. Trial Transcript 2—3, lines 21-24; page 9 of docket sheet, entries for 12/21/83, attached to this brief. Since these other motions, e.g. severance, were decided before the suppression motion, the resolution of the latter was clearly not necessary, let alone "reasonably necessary," to address the former. On this basis alone, these additional 35 days were not excludable; 75 non-exdudable days elapsed from indictment to trial; and the Act was violated.

Finally, even if this Court holds that it was "reasonably necessary" to delay from May 9 until a date by which the Motion to Suppress legally had to be decided, that date would be, at best, November 16, 1983, and not December 23, 1983. The reason for this is that by November 16, 1983 the maximum excludable thirty days under (J) had passed, and a continuance under (h)(8) could not be granted retroactively. See *supra*. If the time after November 16 was not excludable for purposes of deciding the motion to suppress, there should be no bootstrapping of the additional 37 days for these other pre-trial motions. To do otherwise would be to sneak through the back door what cannot be welcomed at the front door. It would create a procedure for courts to bootstrap non-excludable time.

No matter which of these three independent grounds this Court relies upon, the result is the same: a minimum of seventy-five non-excludable days elapsed from indictment to trial, and the Act was, therefore, violated.

B. The Admissibility of the Notebooks

1. *The Red Notebook Should Have Been Excluded at Trial*

The red notebook and its keystone role in the government's

Government's Brief, and then setting out the relevant facts, cases or legislative history.

> (1) "During this 67 day period [October 18-December 23, 1983] the court had for consideration motions of six defendants to suppress, to dismiss, for severance, for order *in limine*, and others relating to trial presentation."[25] (footnote omitted).

All of these motions were filed on May 9, 1983.[26] Other than the Motions to Suppress and Dismiss, none of the others required a hearing prior to determination. Thus, for the other motions, e.g. severance, etc., the trial court had 225 days [May 9, 1983-December 21, 1983] for deciding these.

> (2) 3161(h)(1)(J's) requirement that a Judge actually be working on the motion under advisement for the time to be excludable.

The government's argument on this issue is found at pages 50-52 of its Brief. Certain observations are pertinent to their argument.

[A] The Government Never Presents a Legislative History Which Supports Its Position.

There is *no* presentation or analysis of the legislative history of the Speedy Trial Act in the Government's Brief—none

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[25] Brief for Appellee, p. 50.

[26] E.G. see docket entries 74 through 81, attached to the end of Appellant Carter's Brief.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

* * *

(F) delay resulting from any pretrial motion from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

* * *

THE CLERK: *United States* versus *Carter, ET AL.*

THE COURT: Counsel, I started to get into the docket in this case and what had been done with various motions, and I discovered that there were a whole raft of motions that I'd acted on that weren't docketed and I couldn't even find them. They weren't in the file, they weren't downstairs, and this morning Will Brownsberger, one of the law clerks, found a whole bunch of them put down in the closed files downstairs on the 14th floor in the Courtran Department.

I will tell you now and put on the record what I did with all those things so you can take whatever steps you deem appropriate.

Now, looking at Mr. Cullen's motion, I found one problem right off the bat. The number of days between April the 20th of 1983 and January 23rd of 1984 is not 288 but 278, so we are ten days better off than he would have led us to believe. It's just a matter of sitting down with the calendar and counting.

Now, that leaves us 13 days out, and my solution of the problem depends upon how I think these many motions should be treated, because there were a whole batch of them that I decided on December 21. The question is how much additional allowable time is reasonable for those motions in view of the

United States Court of Appeals
For the First Circuit

NO. 84-1262

UNITED STATES OF AMERICA,

APPELLEE,

v.

JAMES D. CARTER,

DEFENDANT, APPELLANT.

APPELLANT'S PETITION FOR REHEARING

Appellant James D. Carter seeks to have this Court reconsider portions of its anaylsis of the Speedy Trial agruments discussed by the Court at pages 5-12 of the slip opinion issued on August 26, 1985. He also joins in the Petition for Rehearing of his co-appellant Michael Murray with respect to the admissibility of evidence seized which was in plain view during the warrantless search, e.g., the red and blue notebooks.

A. THE RECORD REFLECTS THAT A SERIES OF PRE-TRIAL MOTIONS, E.G. SEVERANCE, ORDER *In Limine*, ETC., WERE DECIDED ON DECEMBER 21, 1983 AND NOT "*On Or After December 23, 1983*".

Several of the defendants filed pre-trial motions other than the Motions to Suppress. Appellant Carter had filed a Motion for Severance/Separate Trial. See page 9 of Carter Docket Sheet attached at end of his initial Brief. Appellant Moscatiello had filed a similar Motion, Consolidated Appendix ("C.A.") 116 and Appellant Rooney had filed Motions for Severance, for an order *in limine*, etc., C.A. 126-7.

All of these were *decided on December 21, 1983* and were so noted on the docket sheets. See e.g. docket entries for 12/21/83 on page 9 of Carter docket sheet, attached to end of his initial Brief; docket entry for 12/21/83 on page 7 of Moscatiello docket

sheet at C.A. 116; and docket entries for 12/21/83 on Rooney docket sheets at C.A. 126-7.

When the trial judge was discussing the Speedy Trial motion with counsel, he stated that this "batch" of motions (those other than the suppression motions) were all decided on December 21, 1983, though not docketed until considerably later.

> "...and my solution of the problem [Speedy Trial Act being violated] depends upon how I think these many motions should be treated, because there were a whole batch of them that *I decided on December 21.* The question is how much additional allowable time is reasonable for those motions in view of the complexity of the suppression motion. I think that the likelihood that I will come up with a resolution of allowable time is at least good enough to continue the trial." Transcript 2—3, line 21 through 2—4, line 3. (emphasis not in original).

As the District Court indicated, its decisions on these motions were not docketed until later, over a month after he had "acted on" them. Transcript 2—3, line 6. Thus, the decision on Carter's and Moscatiello's Motions were not docketed until 1/24/84 and the decision on Rooney's on 1/25/84. See attachment at end of Carter Brief, and C.A. 116, 126-127.

The date of docketing is only pertinent when a party is considering an appeal, for it determines when the time begins to run. *See Chem-Haulers, Inc.* v. *United States*, 536 F.2d 610, 615 (5th Cir. 1976). *Accord Sun Towers, Inc.* v. *Heckler*, 725 F.22 315, 323-4 (5th Cir.) *cert. denied* 105 S.C. 100 (1984). *See also Statler Distributors* v. *Alexander*, 148 F 2d 74, 75 (1st Cir. 1945).

Judge Skinner understood very well that for purposes of the Speedy Trial Act the relevant date was 12/21/83. Though it was not so noted on all of the Appellant's docket sheets, a calculation of excludable time for these non-suppression motions was made on Appellant Rooney's docket entries. It recites that

the "[e]xcludable delay. . .ended on 12/21/83". See C.A. 127, last two notations for 12/21/83.

This point of fact, that the non-suppression motions were decided December 21, 1983, and its legal significance, were set forth in the Brief of Appellant Carter (page 40) and again in his Reply Brief (pages 10 and 21). All of the other Appellants joined in Carter's Speedy Trial arguments.

Turning to the legal significance of December 21, 1983, it is clear that if this group of motions was decided before the Motion to Suppress, then the disposition of the latter was not needed to rule on the former. The Motion to Suppress was decided on December 23, 1983, two days after the other pretrial motions were decided.

The trial court had forgotten the order in which the motions were decided, or had not rechecked the dockets. In any event, Judge Skinner wrote that he "did not consider them [motions other than ones for suppression] or take them under advisement until after I had decided the motion to suppress on December 23, 1983." C.A. 27, quoted at page 10 of the slip opinion. This Court upheld the 37 days as being excludable on the basis that the remaining motions were not decided until December 23, 1983.

> "We agree that the period through December 23, 1983, during which the remaining (non-suppression) motions were pending was excludable under §3161(h)(1)(F). It was reasonable for the court to have withheld decision on these motions until it could decide the suppression motions." Slip opinion at Page 11.[1]

These non-suppression motions were filed between 5/9/83 and 6/2/83. See e.g. docket entries 82 and 83 at page 5 of Carter Docket, attached to end of his initial Brief; and the excludable time calculations docketed on 12/21/83 on Mooney

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[1] This mistake as to the date the non-suppression motions were decided occurs at one other point in the slip opinion. See page 6 (". . .no hearing was held on these latter motions, which were not decided until on or after December 23, 1983").

docket, C.A. 127. Whatever time was reasonably necessary, (a month, even six weeks) had run many months before December 21, 1983.

Both the District Court and this Court relied upon the December 23 decision date on these non-suppression motions to exclude an additional 35 days and thus reduce the non-excludable time from 75 days to 40. Slip opinion at 10 and 12; C.A. 28. When this time is restored, "the trial was. . . held 75 elapsed days after indictment; and the Act was violated." Brief for Appellant Carter at page 40.

On this basis alone, the Petition for Rehearing should be allowed, for it has "direct[ed] the Court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result." *National Labor Relations Board* v. *Brown & Root, Inc.*, 206 F.2d 73, 74 (8th Cir. 1953). *See also* F.R.A.P. 40(a). The present Petition exceeds the standard set forth in *Brown & Root*, for the material fact in question, the date the non-suppression motions were decided, mandates a different result.

B. THE "REASONABLY NECESSARY" TEST OF *Mitchell* WAS INCORRECTLY APPLIED IN THE PRESENT CASE

The Speedy Trial Act has two periods of time during the pendency of pre-trial motions with which it is concerned: the period of time leading up to when a motion is taken under advisement, and the period of time when a motion is "actually under advisement". The former is addressed in 18 U.S.C. §3161(h)(1)(F) and the latter in (h)(1)(J) and (h)(8)(A). See pertinent provisions, quoted verbatim, at page 5 of the slip opinion.

With respect to the period of time during which a motion is under advisement, a Court can exclude up to thirty days under (h)(1)(J) and can grant continuances for additional time under (h)(8)(A).

In the present case, the trial court excluded thirty days for the consideration of the Motions to Suppress. Assuming for the sake of this argument, that all thirty days are excludable, as this Court held (slip opinion, page 10), the remaining 37 days from November 16–December 23, 1983 were not excludable under the Act. However, this Court excluded these remaining days under a test of reasonableness, i.e. the *Mitchell* test.

> "And while the time spent deciding the suppression motions was greater than the 30 days for which credit is automatically allowed under §3161(h)(1)(J), it was unreasonable in light of their multiplicity and obvious complexity (as reflected *infra* in the present opinion)." Slip opinion at page 11.

However the test of reasonableness does not apply to the "time spent deciding. . . motions", but to "such delay as is reasonably necessary from the time of concluding a hearing on it or completing submission of the matter to the court for decision." *United States* v. *Mitchell*, 723 F.2d 1040, 1047 (1st Cir. 1983).

The present opinion also relies upon this Circuit's recent decision in *Anello* for this same proposition, namely that time may be excluded "in excess of 30 days reasonably spent in deciding multiple suppression motions that as a practical matter had to be decided prior to other pending motions."

For the reason already discussed, if *Anello* so held, it is a misapplication of the holding in *Mitchell*. If a District Court is without authority to *retroactively* grant a continuance beyond the thirty days permitted in (h)(1)(J), *United States* v. *Tunneson*, 763 F.2d 74, 77-8 (2nd Cir. 1985); *United States* v. *Carey*, 746 F.2d 228, 230 (4th Cir. 1984), *cert denied* 105 S.Ct. 1398 (1985);[2] *United States* v. *Frey*, 735 F22 350, 352-3

[2] Every Circuit that has ruled on this point has held the same way. This Circuit has noted the weight of authority in two decisions, but has not yet had occasion to state its position. *United States* v. *Rush*, 738 F.22 497, 507 (1st Cir. 1984); *United States* v. *Jodoin*, 672 F.22 232, 237 (1st Cir. 1982). In *Rush*, this Court noted that there was one case that held to the contrary, *United States* v. *Cameron*, 510 F. Supp. 645, 649-50 (D.Md. 1981). On

(9th Cir. 1984); *United States* v. *Janik*, 723 F.22 537, 545 (7th Cir. 1983) (Posner, J.); *United States* v. *Brooks*, 697 F22 517, 521-2 (3rd Cir 1982) *cert. denied* 460 U.S. 1071 (1983), then a Court of Appeals can not do so. This would be particularly true in the present case, where the District Court only excluded 30 days for the suppression motions. C.A. 27; slip opinion at page 6.

However, *Annello* is distinguishable from this case. In the present case, the District Court ruled that only 30 days of the time the suppression motions were under advisement were excludable. Judge Skinner specifically held that the remaining 37 days were not excludable.

> "The period November 16 to December 23 was not excludable by reason of the pendency of the motions to suppress." C.A. 27.

There is no indication in *Annello* that the District Court held that the time beyond 30 days that the suppression motions were under consideration "*was not excludable*". *United States* v. *Annello*, No. 84-1406, slip opinion at 8-10. For all that appears in the published opinion, there may have been properly granted continuances under (h)(8). *Id.*

The restoration of these 37 days brings the total number of non-excludable days to well over 70, and thus the Speedy Trial Act was violated.

This argument[3] was also raised in Appellant Carter's brief [at page 41], an argument in which all of the other appellants joined.

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appeal in a subsequent case again from a District Court in Maryland, the Fourth Circuit held that continuances could not be granted *nunc pro tunc*. *See Carey*, *supra*, 746 F22 at 230. Now that *Cameron* is without precedential authority, there is no decision by any court holding that continuances may be allowed retroactively.

[3] Since *Anello* was decided over eight months after the present case was argued, it, of course, was not discussed in Carter's Brief or Reply Brief.

C. Seizure and Admissibility of the Red and Blue Notebooks

Appellant Carter joins in the Petition For Rehearing to be filed by his co-appellant Michael Murray.

The blue notebook "was found on top of a flatbed truck" in the warehouse. Tr. 4—20, lines 1-2. The red notebook "was found on the hood of the gray Scottsdale Chevy pickup inside the warehouse." Tr. 4—25, lines 20-21. As a result, both notebooks were in plain view during the initial warrantless search of the warehouse. On appeal, Carter joined in the argument of Murray that all evidence should be excluded that was in plain view during this illegal search. Brief for Appellant Carter at pages 48-49; slip opinion at 28-29. If both notebooks are excluded, there would not be sufficient evidence to sustain the conviction of James Carter, and, in any event, their admission can not be deemed harmless error. Brief for Appellant Carter at pages 49-58.

CONCLUSION

On the basis of either Speedy Trial point, standing alone, this Petition should be granted. Each raises a "material matter of law or fact" which was misapprehended in deciding the case; each results in restoring 37 days to the non-excludable time, which results in there having been a violation of the Speedy Trial Act.

Moreover, if Appellant Murray's Petition For Rehearing is granted, then the sufficiency of the evidence sustaining James Carter's conviction, and the question of harmless error, must now be addressed by this Court.

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DATED: September 5, 1985

United States Court of Appeals
For the First Circuit

NO. 84-1262

UNITED STATES OF AMERICA,

APPELLEE,

v.

JAMES D. CARTER,

DEFENDANT, APPELLANT.

PETITION FOR IN BANC CONSIDERATION

Appellant James D. Carter, pursuant to F.R.A.P. 35(b), suggests that it would be appropriate for this Court to hold a hearing in banc in the present case.

Appellant directs this Court's attention to certain portions of the panel's analysis of the Speedy Trial Act which involve questions of exceptional importance.

One of these involves the correctness of employing the *Mitchell* standard to exclude 37 days of 67 days that the Suppression motions were under advisement.

Under the Speedy Trial Act, 18 U.S.C. §3161(h)(1)(J) and (h)(8)(A), once a pre-trial motion is under advisement up to 30 days, with extensions by continuance, may be excluded from the running of the clock. There are no other provisions under the Act for excluding time once a motion is under advisement.

The Act has a different standard for excluding time up to the point that a pre-trial motion is taken under advisement, 18 U.S.C. §3161(h)(1)(J). Under that subsection, this Court has articulated a test of reasonableness. *United States* v. *Mitchell*, 723 F.2d 1040 (1st Cir., 1983).

In the present case, the panel applied the test of reasonableness to exclude the additional 37 days the suppression motions were under advisement.

> "And while the time spent deciding the suppression motions was greater than the 30 days for which credit is

automatically allowed under §3161(h)(1)(J), it was not unreasonable, in light of their multiplicity and obvious complexity (as reflected *infra*, in the present opinion)." (Slip opinion at page 11.)

The improper use of a test of reasonableness, rather than one based on 30 days and continuances in the interest of justice, raises a question of exceptional importance in the administration of the Speedy Trial Act.

A second question that is raised by the exclusion of these same 37 days is that they were not excluded by the District Court.

> "The period November 16 to December 23 was not excludable by reason of the pendency of the motions to suppress."
>
> Memorandum and Order Re Speedy Trial, Consolidated Appendix ("C.A.") page 27.

All the Circuits that have addressed the question have held that a District Court is without authority to *retroactively* grant a continuance beyond the thirty days permitted in h(1)(J). *United States* v. *Tunnesen*, 763 F.2d 74, 77-8 (2nd Cir., 1985); *United States* v. *Carey*, 746 F.2d 228, 230 (4th Cir. 1984), *cert. denied* 105 S.Ct. 1398 (1985);[1] *United States* v. *Frey*, 735 F.2d 350, 352-3 (9th Cir. 1984); *United States* v. *Janik*, 723 F.2d 537, 545 (7th Cir. 1983 (Posner J.); and *United States* v. *Brooks*, 697 F.2d 517, 521-2 (3rd Cir. 1982). Therefore, the panel decision raises the issue of whether a Court of Appeals,

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[1] Every Circuit that has ruled on this point has held the same way. This Circuit has noted the weight of authority in two decisions, but has not yet had occasion to state its position. *United States* v. *Rush*, 738 F.2d 497, 507 (1st Cir. 1984); *United States* v. *Jodoin*, 672 F2d 232, 237 (1st Cir. 1982). In *Rush*, this Court noted that there was one case that held to the contrary, *United States* v. *Cameron*, 510 F. Supp. 645, 649-50 (D. Md. 1981). On appeal in a subsequent case, again from a District Court in Maryland the Fourth Circuit held that continuances could not be granted *nunc pro tunc*. *See Carey*, *supra*, 746 F.2d at 230. Now that *Cameron* is without precedential authority, there is no decision by any court holding that continuances may be allowed retroactively.

by whatever test, can retroactively exclude days which a District Court can not exclude. This constitutes a question of exceptional importance in the administration of the Speedy Trial Act.

The third question involves the use of a date by the panel which is in conflict with the date noted in the dockets and attested to, at least once, by the District Court. To appreciate the significance of the dates, they must be set in context.

The District Court had two groups of Motions before it for decision: motions to suppress, and a group of non-suppression motions, e.g. severance, orders *in limine*, etc. Slip opinion at 6. All of the Motions from both groups were filed on May 9, 1983. *Id.* Decisions were rendered on the suppression motions on December 23, 1983. *Id.*

Trial began on January 23, 1984. *Id.* On that date the defendants filed a Motion to Dismiss "for violation of the Speedy Trial Act". Slip opinion at 4. On February 10, 1984, after the trial was over, the District Court issued its order denying the Speedy Trial motion. C.A. 26.

In that order, the District Court recited that it had not considered or taken the non-suppression motions under advisement until after the suppression motions were decided on December 23, 1983. Slip opinion at 10.

Both the District Court and the panel excluded the time until December 23, 1983, on the basis that the Motions to Suppress were decided before the non-suppression motions, and that

> "It was reasonable for the court to have withheld decision on these motions until it could decide the suppression motions." Slip opinion at 11; generally see discussion at pages 10-11.

The docket, however, and the District Court on at least one occasion, reflect that the non-suppression motions were decided on December 21, 1983, two days before the suppressions motions were decided. See discussion below. Since this was the sequence, it was neither reasonable nor necessary for the non-suppression motions

not to be taken under advisement until the suppression motions were decided.

The docket sheets for each of the defendant's recites that the non-suppression motions were decided on December 21, 1983. See page 9 of Carter's docket sheet, reproduced at end of his Brief; page 7 of Moscatiello's docket sheet, reproduced at C.A. 116; and the two pages of Rooney's docket sheets reproduced at C.A. 126-7.

In fact, at the end of the 12/21/83 Rooney docket entries there are two entries in which excludable time is calculated under the Speedy Trial Act for these non-suppression motions. C.A. 127. Each one recites as pertinent here, that

> "Excludable delay due to hearings on Pretrial Motions. . . *ended on 12/21/83*. . ." (Emphasis not in original). C.A. 127.

Finally, on the day that the District Court discussed the Speedy Trial Motion with counsel, January 24, 1984, the judge specifically stated that he had decided these motions "on December 21." Tr. 2—3, line 24.

When the trial court drafted the order on the Speedy Trial Motion, two and a half weeks later, he misremembered the order in which he decided the suppression and non-suppression motions or overlooked verifying the dates with the docket.

This question, along with the prior two, was raised before the panel in a Petition for Rehearing.

A decision being based upon a date which is not the one recited in the record involves a question of exceptional importance.

Finally, it should be noted that these issues were raised in Appellant Carter's original and Reply Briefs, i.e. December 21, 1983 date, Brief at pages 40-41 and Reply Brief at page 10; continuance can not be granted retroactively, Brief at pages 37-38; and the inappropriateness of bootstrapping the 37 additional days, Brief at page 41.

Appellant Carter joins in the Petitions For In Banc Consideration to be filed by the other Appellants.

Based on the discussion in this Petition and those in the Petitions filed by co-appellants, a hearing *in banc* should be granted in this case.

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DATED: September 5, 1985

United States Court of Appeals
For the First Circuit

No. 84-1192

UNITED STATES OF AMERICA,

APPELLEE,

v.

CHRISTOPHER MOSCATIELLO,

DEFENDANT, APPELLANT.

No. 84-1193

UNITED STATES OF AMERICA,

APPELLEE,

v.

JOHN M. ROONEY,

DEFENDANT, APPELLANT.

No. 84-1262

UNITED STATES OF AMERICA,

APPELLEE,

v.

JAMES D. CARTER,

DEFENDANT, APPELLANT.

No. 84-1263

UNITED STATES OF AMERICA,

APPELLEE,

v.

MICHAEL F. MURRAY,

DEFENDANT, APPELLANT.

Before
CAMPBELL, *Chief Judge*,
BREYER, *Circuit Judge*,
and WEIGEL,* *Senior District Judge*.

ON PETITION FOR REHEARING
Entered October 31, 1985

For purposes of clarification, we amend our opinion issued August 26, 1985 as follows:

On page 11, first full paragraph, line 1, after "that", insert the words "at least part of".

On page 11, first full paragraph, line 3, after "§3161(h)(1)(F)," add: ", in respect to those particular motions."

On page 11, first full paragraph, last line add: "This is not to say, of course, that more than 30 days can be *excluded* under section 3161(h)(1)(J) for deciding the suppression motions. Rather, we simply hold that the additional five days which must be excluded to avoid a violation of the Act are excludable under section 3161(h)(1)(F) as constituting time reasonably attributable to the remaining non-suppression motions."

On page 12, first paragraph, line 2, "amounted to 45 days" should be changed to read "did not exceed 70 days."

The petition for rehearing is in all other respects denied.

By the Court,
s/ FRANCIS P. SCIGLIANO
Clerk

[CC: MESSRS: O'CONNELL, WEINBERG, STEIN, RANDOLPH AND CROSSEN]

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* Of the Northern District of California, sitting by designation.

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UNITED STATES OF AMERICA,

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v.

MICHAEL F. MURRAY,

DEFENDANT, APPELLANT.

Before
CAMPBELL, *Chief Judge*,
COFFIN, BOWNES, BREYER AND TORRUELLA,
Circuit Judges.

ORDER OF COURT
Entered: October 31, 1985

The petition for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing en banc be hereby denied.

By the Court:
s/ FRANCIS P. SCIGLIANO
Clerk.

[CC: MESSRS. O'CONNELL, WEINBERG, STEIN, RANDOLPH AND CROSSEN]

> it was not held an unreasonable time in my view given the complexity of the testimony and the difficulty of determining the extent to which subjective judgment, albeit expert, should support a finding of probable cause. While the Speedy Trial Act is intended to discourage obsessional delay, it should not be interpreted to discourage thoughtful consideration by the district judges of difficult questions.

We agree that *at least part* * of the period through December 23, 1983, during which the remaining (non-suppression) motions were pending was excludable under §3161(h)(1)(F) *in respect to those particular motions.* It was reasonable for the court to have withheld decision on these motions until it could decide the suppression motions. These remaining motions, as Judge Skinner stated, "primarily concerned the ordering of the trial." Had the suppression motions been sustained, the prosecution might not have had sufficient evidence to go forward, rendering the procedural motions moot. And while time spent deciding the suppressions motions was greater than the 30 days for which credit is automatically allowed under §3161(h)(1)(J), it was not unreasonable, in light of their multiplicity and obvious complexity (as reflected, infra, in the present opinion.) *This is not to say, of course, that more than 30 days can be excluded Under section 3161(h)(1)(J) for deciding the suppression motions. Rather, we simply hold that the additional five days which must be excluded to avoid a violation of the Act are excludable under section 3161(h)(1)(F) as constituting time reasonably attributable to the remaining non-suppression motions.*

This case is on all fours with our recently decided case of *United States* v. *Anello*, NO.84-1406, slip op. at 8-11 (1st Cir. June 20, 1985), where we excluded time in excess of 30 days reasonably spent in deciding multiple suppression motions that

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* The underlined portions are the new language inserted by the order on the petition for rehearing.

as a practical matter had to be decided prior to other pending motions. Following *Anello*, we affirm the district court's exclusion of such time here.

We conclude that the total nonexcludable time *did not exceed 70 days*, and that the Speedy Trial Act was not violated.

II. Search and Seizure Issues
